TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1916

No. [redacted] 219

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

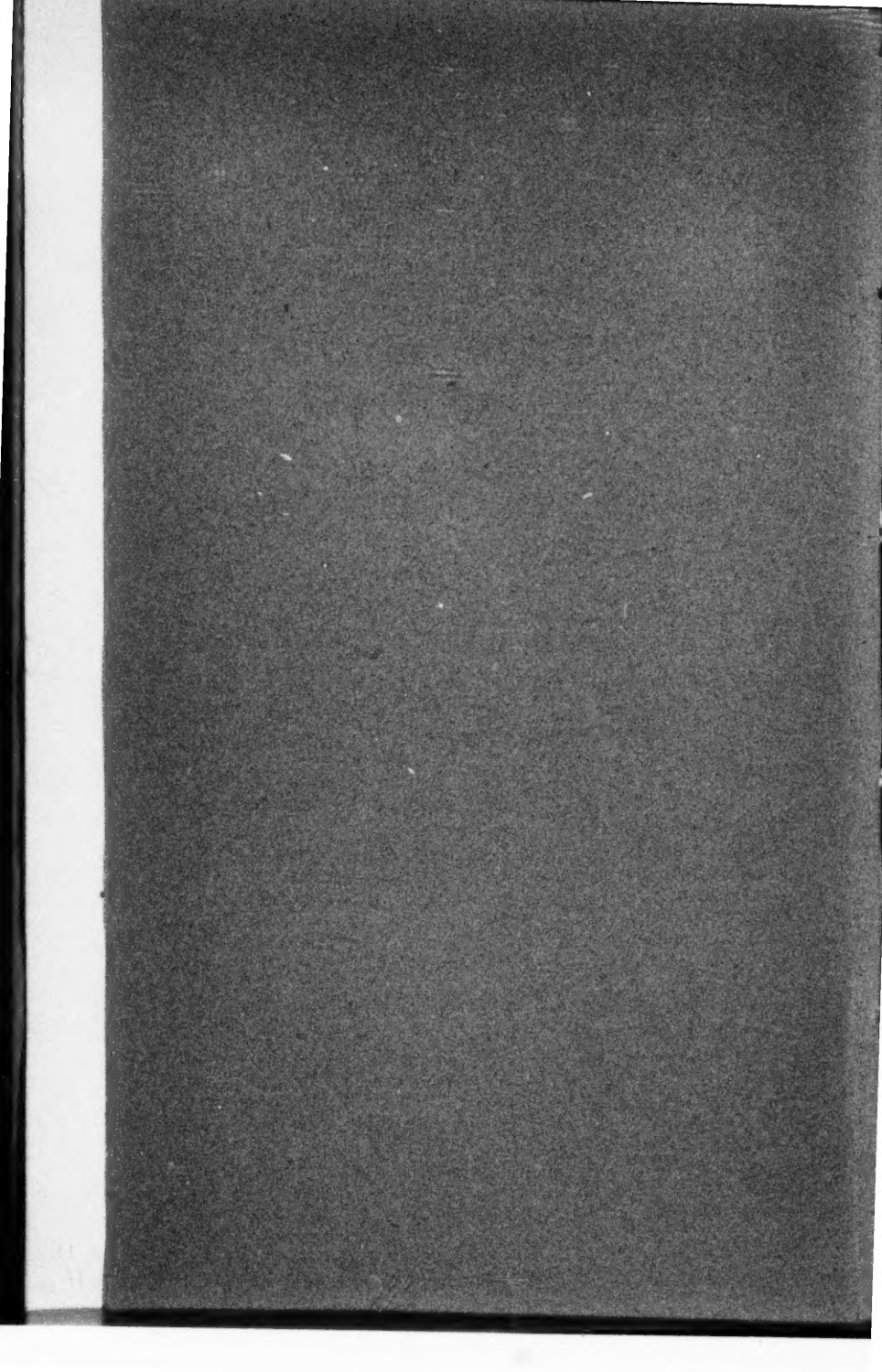
vs.

H. E. PUCKETT.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

FILED AUGUST 18, 1916.

(24,881)



(24,881)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 598.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

H. E. PUCKETT.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

INDEX.

	Original.	Print
Transcript of record from the city court of Atlanta	1	1
Bill of exceptions	1	1
Judge's certificate to bill of exceptions	13	6
Clerk's certificate to bill of exceptions	14	6
Petition	15	7
Summons and service	28	12
Petition for removal	29	13
Bond for removal	33	15
Order overruling petition for removal	36	16
Bill of exceptions *pendente lite*	37	17
Judge's certificate	38	17
Demurrer	38	17
Answer	45	20
Order on demurrer	49	22
Bill of exceptions *pendente lite*	50	23
Judge's certificate	51	23
Amended petition	52	24
Demurrer to amended petition	57	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 20, 1916.

	Original.	Print
Order on demurrer	59	28
Plaintiff's amendments	60	28
Defendant's amendments	62	29
Petitioner's amendment	64	30
Verdict	66	31
Judgment	66	31
Exceptions *pendente lite*	67	31
Judge's certificate	70	33
Motion for a new trial	70	33
Order on motion	71	33
Amended motion for new trial	73	34
Order denying motion for new trial	79	37
Brief of evidence	80	37
Testimony of H. E. Puckett	80	37
J. L. Chappelle	103	47
G. W. Lindsay	112	51
I. H. McElroy	116	53
W. E. Jackson	119	54
H. E. Cochran	122	56
J. P. McDonald	124	57
J. N. Biddy	128	58
C. F. McDaniel	130	59
Samuel Smith	132	60
R. L. Cowen	134	61
H. M. Gilmer	140	63
J. W. Whittaker	142	64
C. G. Lee	145	66
Rules of Southern Railway Co.	151	68
Judge's certificate to brief of evidence	155	70
Defendant's Exhibits A, B, C, and D—Photographs	156	70
Rule Book, Southern Railway Company (omitted in printing)	160	71
Charge to jury	161	71
Clerk's certificate	186	81
Opinion, Broyles, J	188	82
Judgment	202	88
Writ of error	203	88
Citation and service	205	89
Petition for a writ of error	208	91
Order allowing writ of error	209	91
Assignment of errors	210	92
Bond on writ of error	218	95
Præcipe for transcript of record	220	96
Clerk's certificate	222	96
Stipulation to omit parts of record in printing	223	97

1 STATE OF GEORGIA,
County of Fulton:

City Court of Atlanta.

No. 23192.

H. E. PUCKETT
vs.
SOUTHERN RAILWAY COMPANY.

Be it remembered, That during the March Term, 1914, of the city court of Atlanta, before the Honorable H. M. Reid, Judge thereof, there came on to be heard the case of H. E. Puckett against Southern Railway Company, the same being a suit for personal injuries alleged to have been sustained by the plaintiff on August 26, 1911, suit having originally been brought against Southern Railway Company and certain individual defendants, to wit: R. L. Cowan, Samuel Smith and J. N. Biddy, the suit as originally filed embracing two counts, the first based on the State law, and the second based on the Act of Congress of 1908, as amended, known as "The Federal Employers' Liability Act." Prior to the trial the first count of the petition and the three individual defendants in the second count were stricken by amendment of plaintiff, so that the action when tried proceeded against Southern Railway Company as sole defendant on the second count of petition based on the said Federal Employers' Liability Act.

2 Said case during said term was tried before a jury, and after evidence was introduced for the plaintiff and defendant and after argument and charge of the court, the jury at said March Term, 1914, to wit: on April 7, 1914, rendered a verdict in favor of the plaintiff and against the defendant Southern Railway Company for Seven Thousand, Two Hundred and Fifty, ($7,250) Dollars.

The defendant Southern Railway Company thereafter, at the same term of the court, within the time prescribed by law, filed its motion for new trial and in connection with said motion for new trial filed a duly approved brief of the evidence and amendment to its motion for new trial, as well as the approved charge of the court, the grounds of the original motion and the amendment thereto having been duly approved and certified by the court. That said motion for new trial was heard on June 23rd, 1914, and after consideration the court on said date, to wit: June 23, 1914, overruled said motion for new trial and entered its formal order overruling said motion and denying a new trial.

To this decision, judgment and order of the court overruling its motion for new trial the defendant then and there excepted and now excepts to the same and assigns error thereon, and for specific assignment of error says that the court erred in overruling the said

motion for new trial on each and all of the grounds contained
3 in the original and the amended motion, and Southern Railway Company avers that said motion for new trial should have been granted on each and all of the grounds contained in the original motion and the amendment thereto.

Be it further remembered, That before the time for pleading to the defendant's declaration, either by law or through a rule of the court, arrived, it filed its petition and bond for the removal of the cause to the Circuit Court of the United States (now the District Court) for the Northern District of Georgia, and that the court, after considering its petition for removal, passed an order denying the same, which decision, order and judgment of the court denying the petition for the removal of the cause to the said United States Court, Southern Railway Company then and there excepted to and now excepts to the same and assigns the same as error.

After the order denying its petition for removal was passed, at the same term of court and within the time required by law Southern Railway Company filed its exceptions pendente lite preserving of record its exceptions to the order of the Court denying its application for removal and the errors assigned thereon, and Southern Railway Company here and now assigns error upon the specifications contained in said exceptions pendente lite.

4 Be it further remembered, That Southern Railway Company at the first term filed a demurrer to plaintiff's petition upon various grounds, which demurrer coming on to be heard was sustained in part and overruled in part, as shown by the order passed by the court on January 6th, 1912, to which order of the court, in so far as the same overruled portions of its demurrer, Southern Railway Company then excepted and now excepts to the same and assigns the same as error.

After the order of January 6th, 1912, overruling its demurrer in part, was passed, at the same term of the court and within the time required by law, defendant filed its exceptions pendente lite preserving in the record its exceptions to the ruling, judgment and order of the court in so far as said demurrer was overruled; and Southern Railway Company here and now assigns error upon the specifications contained in said exceptions pendente lite.

Be it further remembered, That on the 7th day of June, 1913, the plaintiff filed two amendments to his petition and on said date Southern Railway Company filed a demurrer to such amendments and to the petition as amended and that upon a consideration of the demurrer in question the Court of June 7th, 1913, overruled the same on each and every ground thereof, to which order, ruling and judgment of the court in overruling its demurrer to the amendments filed by the plaintiff and to his petition as amended Southern Railway Company excepted and now excepts to the same and as-
5 signs the same as error; and Southern Railway Company shows that after the order of the Court overruling its second demurrer was passed, at the same term of the court at which the decision was made and the order and judgment entered and within the time required by law it filed its exceptions pendente lite, pre-

serving of record its exceptions to the order overruling said second demurrer and the errors assigned thereon, and Southern Railway Company here and now assigns error upon the specifications contained in said exceptions pendente lite.

Be it further remembered, That during the trial of the case as aforesaid and after the plaintiff had introduced all of his evidence Southern Railway Company moved the court for a nonsuit upon the ground that the plaintiff had failed by his evidence to sustain the case made by his petition and amendments thereto in the following particulars:

(1) Because plaintiff had failed to show by his evidence that he was employed in interstate commerce at the time of his alleged injuries for which suit was brought;

(2) Because the plaintiff had failed by his evidence to show that the defendant was guilty of the acts of negligence charged in the petition.

After considering said motion for a nonsuit the court overruled the same, to which decision, judgment and ruling of the
6 court defendant Southern Railway Company then and there excepted and now excepts to the same and assigns the same as error.

Defendant Southern Railway Company, after the overruling of its nonsuit and at the same term of court and within the time required by law filed its exceptions pendente lite, preserving of record its exceptions to the overruling of its motion for nonsuit and the errors assigned thereon, and Southern Railway Company here and now assigns error upon the specifications contained in said exceptions pendente lite.

Be it further remembered, That during the trial of the case, to wit: on the 6th day of April, 1914, plaintiff filed another amendment to his petition, to the allowance of which amendment Southern Railway Company objected upon the ground that the same did not in and of itself show and did not, in connection with the allegations in the original petition and the amendments thereto, show that plaintiff was engaged in interstate commerce at the time of his alleged injuries and was thereby entitled to the benefits of the Act of Congress of 1908 and the amendment thereto, generally known as "The Federal Employers' Liability Act."

The court over objection allowed said amendment, to which decision and order Southern Railway Company then and there
7 excepted and now excepts to the same and assigns the same as error.

After the allowance of said amendment, Southern Railway Company then renewed its general demurrer to the declaration as amended and urged the dismissal of plaintiff's suit upon the ground that the petition as amended did not by its allegations show that H. E. Puckett was engaged in interstate commerce at the time of his alleged injury, so as to bring him within the purview and entitle him to the benefits of the Act of Congress of 1908 as amended, generally known as "The Federal Employers' Liability Act;" and the court then and there overruled its demurrer, to which decision and order of the court overruling its demurrer based upon the ground afore-

said defendant Southern Railway Company then and there excepted and now excepts to the same and assigns the same as error.

After the allowance of said last-named amendment and the overruling of its demurrer which was renewed to the petition as amended upon the ground above stated, at the same term of the court and within the time required by law, Southern Railway Company filed its exceptions pendente lite, preserving of record its exceptions to the allowance of said amendment over objection and to the overruling of its renewed demurrer and the errors assigned thereon and it here and now assigns error upon the specifications contained in said exceptions pendente lite. Southern Railway Company also
8 preserved in said exceptions pendente lite its exceptions to the overruling of the demurrer which it renewed to the petition as amended and here and now assigns error on said exceptions pendente lite upon the specifications with respect to the overruling of said renewed demurrer.

Southern Railway Company specifies the following portions of the record in said case as material to a clear understanding of the errors in this bill of exceptions complained of, to wit:

1. The original petition in said case filed November 10, 1911, with entry of service thereon;

2. The petition and bond for the removal of the case to the Circuit Court of the United State for the Northern District of Georgia, filed by Southern Railway Company on December 20, 1911; order of the court overruling and denying the application for removal of December 20, 1911, and exceptions pendente lite filed by Southern Railway Company to such ruling and order on December 20, 1911;

3. Demurrer of Southern Railway Company filed December 29, 1911; order of the court of January 6, 1912, thereon, sustaining said demurrer in part and overruling it in part; exceptions pendente lite filed by Southern Railway Company on January 10, 1912, to order of the court overruling in part its demurrer;

4. Answer of Southern Railway Company filed December 29, 1911;

9 5. Amendment of plaintiff to his petition filed June 7, 1913;

6. Demurrer of Southern Railway Company filed June 7, 1913; order of court of same date overruling said demurrer, and exceptions pendente lite filed by Southern Railway Company on June 14, 1913, to order and judgment of the court overruling said demurrer;

7. Amendment of plaintiff filed on June 7, 1913, and allowed on June 7, 1913, which was unobjected and unexcepted to;

8. Amendment of plaintiff to his petition filed March 9, 1914, with respect to his injuries;

9. Amended answer of Southern Railway Company filed March 9, 1914;

10. Amendment of plaintiff to his petition filed and allowed on April 6, 1914, over objection of defendant;

11. Exceptions pendente lite filed by defendant Southern Railway Company on April 10, 1914;

12. Verdict of the jury of April 7, 1914, and judgment thereon on April 9, 1914;

13. Original motion for new trial filed by Southern Railway Company on April 10, 1914, together with rule nisi of court thereon and entry of service upon the same;

10 14. Amended motion for new trial filed by Southern Railway Company on June 23, 1914, with entry of service thereon and order of the court allowing the same and sanctioning and approving the grounds of the original motion for new trial and the grounds of the amended motion for new trial;

15. Approved charge of the court filed on June 23, 1914;

16. Entries of filing, consent of counsel and approval of court upon the brief of evidence;

17. Order of June 23, 1914, denying and overruling the motion for new trial.

Southern Railway Company specifies the following oral and documentary evidence as material to a clear understanding of the errors complained of, the same being portions of the brief of evidence approved by the court as true and correct on June 23, 1914, and filed on the same date, which brief of evidence became a part of the record in the case:

(*a*) The entire oral evidence of the following evidence of the following witnesses: H. E. Puckett, J. L. Chappelle, G. W. Lindsay, I. H. McElroy, W. E. Jackson, H. E. Cochran, J. P. McDonald, J. N. Biddy, C. F. McDannell, Samuel Smith, R. L. Cowan, H. M. Gilmer, J. W. Whitaker and C. G. Lee.

(*b*) The evidence setting forth the rules of the Company

11 which were introduced in evidence contained in the approved brief of evidence on pages 35 and 36, together with the statement on page 36 of the approved brief of the evidence relative to the use of rule book by the Court in considering the admissibility of the rules offered in evidence, and the stipulation on the same page relative to the use in the Appellate Court of said rule book of Southern Railway Company, and the identified rule book attached to the approved brief of evidence.

(*c*) The briefed evidence relative to two bills of lading introduced by defendant, which briefed evidence is contained on page 108 of the approved brief of evidence.

(*d*) The briefed evidence relative to application of H. E. Puckett to the Southern Railway Company introduced in evidence by the defendant, which evidence is contained in the approved brief on page 108.

(*e*) Agreed statement in brief of evidence on page 109 relative to switch list of defendant company introduced in evidence by plaintiff.

(*f*) Four photographs attached to brief of evidence identified in defendant's exhibits A, B, C and D.

12 The foregoing evidence is all that is material to a clear understanding of the errors complained of. The other evidence contained in the brief of evidence relating only to the injuries claimed to have been received by the plaintiff, H. E. Puckett, which evidence was only material to the ground for motion for new trial complaining that the verdict was excessive, which ground is not now insisted upon.

And now within the time provided by law and within thirty day of the entry of the order and judgment overruling said motion fo new trial as amended comes Southern Railway Company and ten ders this its bill of exceptions and prays that the same may be signe and certified as provided by law in order that the errors complaine of may be considered and corrected by the Court of Appeals.

McDANIEL & BLACK,
Attorneys for Southern Railway Co.,
P. O. Address, Atlanta, Georgia.

13 I do certify that the foregoing bill of exceptions is true and specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the City Clerk of the city court of Atlanta is hereby ordered to mak out a complete copy of such parts of the record in said case as ar in this bill of exceptions specified and certify the same as such and cause the same to be transmitted to the Court of Appeals, that th errors alleged to have been committed may be considered and cor rected. June 25, 1914.

H. M. REID,
Judge City Court of Atlanta.

Due and legal service of the within and foregoing bill of exception acknowledged. Copy received. All further service waived. This June 25, 1914.

ATKINSON & BORN.

14 (Endorsed:) No. 23192. City Court of Atlanta. H. E Puckett vs. Southern Railway Co. Bill of Exceptions Filed in office, this the 25 day of June, 1914. Arnold Broyles, Clerk

GEORGIA, *Fulton County*:

I hereby certify, That the foregoing bill of exceptions, hereunto attached, is the true original bill of exceptions in the case stated to wit: Southern Railway Company, Plaintiff in error, vs. H. E Puckett, Defendant in error, and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of Court affixed this the 15 day of July, 1914.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court Fulton County, Georgia,
Ex-Officio Clerk City Court of Atlanta.

15 (Endorsed:) Case No. 5885. Court of Appeals. Octobe Term, 1914. Southern Railway Co. versus H. E. Puckett Bill of Exceptions. Filed in office June 25, 1914. Arnold Broyles Clerk. Filed in office Jul. 15, 1915. W. E. Talley, D. Clerk.

COPY BOUND

16 (*Petition.*)

City Court of Atlanta, January Term, 1912.

No. 23192.

H. E. PUCKETT
v.
SOUTHERN RAILWAY COMPANY et al.

GEORGIA, *Fulton County:*

To the City Court of Atlanta:

H. E. Puckett brings this his complaint against Southern Railway Company and R. L. Cowan and Samuel Smith and J. N. Biddy, and for cause of complaint alleges,

1. That R. L. Cowan is a citizen and resident of said State and County.

2. That Samuel Smith is a resident and citizen of said State and County.

3. That J. N. Biddy is a citizen and resident of said State and County.

4. That said Southern Railway Company is a railroad corporation operating lines of railroad in and through said county, having an agent, an office, and doing business in said county.

5. That the said defendants Southern Railway Company, and R. L. Cowan and Samuel Smith, and J. N. Biddy, have jointly injured and damaged your petitioner in the sum of Thirty Thousand ($30,000) Dollars for that your petitioner avers:

17 That on the occasion herein referred to, your petitioner was in the employ of the said Southern Railway Company in the capacity of car inspector.

7. That on or about August 26, 1911, at about 10:40 o'clock P. M., your petitioner was seriously and permanently injured in manner and by means as is herein fully set forth.

8. Your petitioner was injured in said State and County.

9. That R. L. Cowan was in the employ of said Southern Railway Company in the capacity of track foreman.

10. That Samuel Smith was in the employ of said Southern Railway Company in the capacity of track supervisor.

11. That said J. N. Biddy was in the employ of the said Southern Railway Company in the capacity of road master.

12. That on the occasion herein referred to, A. P. O'Berry, a switchman, of the said Southern R[illegible]way Company, had been caught in a collision between an engine and box car of defendant company in the North Inman yards, and was pinned down between the box car and end sill of said engine.

13. The box car had been set on fire by the bursting of the oil head light and the said O'Berry was in great danger of losing his life both by fire from the burning box car, and by being mashed to death by said box car.

LOSE IN CENTER

18 14. It was the duty of your petitioner to aid in rescuing the said O'Berry from the said wreck as aforesaid, as well as to assist in clearing away said wreck.

15. That there are a number of tracks in said yards.

16. The track furtherest east is known as the lead track from the transfer and is also known as track No. 27.

17. This track was near, that is to say, about 25 yards from where the said collision occurred.

18. In order to get some blocks to use in jacking up the box car to release O'Berry, as well as to clear up the wreck, it became necessary for your petitioner to go across the said lead track.

19. After he had gone across the said lead track and had placed the blocks on his shoulders, the blocks being approximately of the following size, namely, 3 ft. long and 5 inches by 9 inches in thickness, and the other one about 3 feet and a half long and 6 inches by 15 inches in thickness, he started with the blocks up alongside the said lead track for the purpose of going around some box cars standing on the said lead track, so as to reach the scene of the collision and the point where O'Berry was pinned beneath the box car.

20. That lying within one or two feet of the said lead track and at about right angles to said track were two old and worn out cross ties.

21. That within four or five feet of said two cross ties
19 there were three or more clinkers about six inches or eight inches in diameter. These clinkers were lying about one or two feet from the said lead track and on the said road bed.

22. That it was dark, and your petitioner could not see the clinkers or cross ties. Grass had grown around the said clinkers and cross ties, also preventing your petitioner from seeing them.

23. That when he reached the said clinkers, he stumbled over them, which started him, and then he struck in his stumbling the said two cross ties which threw him heavily to the ground, falling with his face to the ground and the two heavy blocks he was carrying falling heavily on his back, seriously, dangerously and permanently injuring your petitioner, as herein fully set forth.

24. That it was the duty of the said R. L. Cowan, track foreman to keep the said track and road bed free from obstruction and of grass, your petitioner fell over, as aforesaid.

25. That it was the duty of said Samuel Smith, track supervisor to keep the said track and road bed free from obstruction, grass your petitioner fell over, as aforesaid.

26. That it was the duty of the said J. N. Biddy, road master to keep the said track and road bed free from obstruction and grass and other growth such as your petitioner fell over, as aforesaid.

20 27. That said defendant company and R. L. Cowan and Samuel Smith, and J. N. Biddy were jointly and concurrently negligent in that the said two old cross ties were lying alongside said track, as aforesaid.

28. That the said Southern Railway Company and R. L. Cowa

COPY BOUND C

and Samuel Smith and J. N. Biddy were jointly and concurrently negligent in that the said three large clinkers were on said road bed as aforesaid.

29. That the said Southern Railway Company and R. L. Cowan and Samuel Smith and J. N. Biddy were jointly and concurrently negligent in that the said grass had grown up on said road bed as aforesaid.

30. That your petitioner did not know that the said obstructions, namely, three clinkers and two cross ties were on said road bed as aforesaid.

31. That in and about the premises your petitioner was wholly free from fault and negligence.

32. That as a consequence of said fall, your petitioner received serious, dangerous and permanent bodily injuries; that is to say, his back was injured, the muscles thereof being strained and bruised. His left kidney was injured and bruised. He passes blood through his urine. The small of his back was injured. The spinal
21 column being bruised and wrenched, and his left shoulder and left hand were sprained and left arm was bruised and injured. The left sacra illiac joint was injured, twisted, and bruised, and he received a severe nervous shock. He was confined to his home for 37 days.

33. That on account of said injuries your petitioner has suffered and will continue to suffer so long as he lives great physical pain and mental anguish on account of said injuries.

34. That at the time of the infliction of said injuries, your petitioner was active, strong, healthy, vigorous, and well. He was 36 years of age with an expectancy of 30:32 years to live in the future. He was capable of earning $93.67 per month, or other large sum. Since the infliction of said injuries, he has not been able to earn any money whatever. His earning capacity has been permanently impaired; that is to say, it has been reduced four-fifths of what it was prior to the infliction of said injuries.

By way of second count, your petitioner respectfully shows:

35. That R. L. Cowan is a citizen and resident of said State and County.

36. That Samuel Smith is a citizen and resident of said State and County.

37. That J. N. Biddy is a citizen and resident of said
22 State and County.

38. That said Southern Railway Company is a railroad corporation operating lines of railroad in and through said county, having an agent, an office, and doing business in said County.

39. That the said defendants Southern Railway Company and R. L. Cowan and Samuel Smith and J. N. Biddy have jointly injured and damaged your petitioner in the sum of Thirty Thousand ($30,000.) Dollars for that your petitioner avers:

40. That on the occasion herein referred to, your petitioner was in the employ of said Southern Railway Company in the capacity of car inspector.

41. That on or about August 26, 1911, at about 10:40 o'clock

P. M., your petitioner was seriously and permanently injured in manner and by means as is herein fully set forth.

42. Your petitioner was injured in said State and County.

43. That at the time aforesaid, the said Southern Railway Company was a common carrier and engaged in interstate commerce.

44. That at the time of the infliction of said injuries, your petitioner was employed by said common carrier and was engaged in interstate commerce.

45. That R. L. Cowan was in the employ of said Southern Railway Company in the capacity of track foreman.

23 46. That Samuel Smith was in the employ of said Southern Railway Company in the capacity of track supervisor.

47. That said J. N. Biddy was in the employ of the said Southern Railway Company in the capacity of road master.

48. That on the occasion herein referred to A. P. O'Berry, a switchman of the said Southern Railway Company, had been caught in a collision between an engine and box car of defendant company in the North Inman yards, and was pinned down between the box car and end sill of said engine.

49. The box car had been set on fire by the bursting of the oil head light and the said O'Berry was in great danger of losing his life by fire from the burning box car, and by being mashed to death by said box car.

50. It was the duty of your petitioner to aid in rescuing the said O'Berry from the said wreck as aforesaid, as well as to assist in clearing away said track.

51. That there are a number of tracks in said yards.

52. The track furtherest east is known as the "lead track" from the transfer and is also known as Track No. 27.

53. This track was near; that is to say about 25 yards from where the said collision occurred.

24 54. In order to get some blocks to use in jacking up the box car to release O'Berry, as well as to clear up the wreck, it became necessary for your petitioner to go across the said lead track.

55. After he had gone across the said lead track and had placed the blocks on his shoulders, the blocks being approximately of the following size, namely, 3 feet long and 5 inches by 9 inches in thickness, and the other one about 3 feet and a half long and 6 inches by 15 inches in thickness, he started with the blocks up alongside the said lead track for the purpose of going around some box cars standing on the said lead track, so as to reach the scene of the collision and the point where O'Berry was pinned beneath the box car.

56. That lying within one or two feet of the said lead track and at about right angles to said track were two old and worn out cross ties.

57. That within four or five feet of said two cross ties, there were three or more clinkers about 6 inches or 8 inches in diameter. These clinkers were lying about one or two feet from the said lead track and on the said road bed.

58. That it was dark, and your petitioner could not see the clinkers

or cross ties. Grass had grown around the said clinkers and cross ties, also preventing your petitioner from seeing them.

25 59. That when he reached said clinkers, he stumbled over them, which started him, and then he struck in his stumbling the said two cross ties which threw him heavily to the ground, falling with his face to the ground and the two heavy blocks he was carrying falling heavily on his back, seriously, dangerously, and permanently injuring your petitioner, as herein fully set forth.

60. That it was the duty of the said R. L. Cowan, track foreman, to keep the said track and road bed free from obstruction and of grass, your petitioner fell over, as aforesaid.

61. That it was the duty of the said Samuel Smith, track supervisor to keep the said track and road bed free from obstruction, grass and other growth such as your petitioner fell over, as aforesaid.

62. That it was the duty of the said J. N. Biddy, road master, to keep the said track and road bed free from obstruction and grass your petitioner fell over, as aforesaid.

63. That said defendant company and R. L. Cowan and Samuel Smith and J. N. Biddy were jointly and concurrently negligent in that the said two old cross ties were lying alongside said track, as aforesaid.

64. That the said Southern Railway Company and R. L. Cowan and Samuel Smith and J. N. Biddy were jointly and concurrently negligent in that the said three large clinkers were on said

26 road bed, as aforesaid.

65. That the said Southern Railway Company and R. L. Cowan and Samuel Smith and J. N. Biddy were jointly and concurrently negligent in that the said grass had grown up on said road bed, as aforesaid.

66. That your petitioner did not know that the said obstructions, namely, three clinkers and two cross ties, were on said road bed, as aforesaid.

67. That in and about the premises your petitioner was wholly free from fault and negligence.

68. That as a consequence of said fall, your petitioner received serious, dangerous, and permanent bodily injuries; that is to say, his back was injured, the muscles thereof being strained and bruised. His left kidney was injured and bruised. He passed blood through his urine. The small of his back was injured. The spinal column being bruised and wrenched, and his left shoulder and left hand were sprained and left arm was bruised and injured. The left sacra il/iac joint was injured, twisted and bruised, and he received a severe nervous shock. He was confined to his home for 37 days.

69. That on account of said injuries your petitioner has suffered and will continue to suffer so long as he lives, great physical pain and mental anguish on account of said injuries.

27 70. That the time of the infliction of said injuries, your petitioner was active, strong, healthy, vigorous, and well. He was 36 years of age with an expectancy of 30.32 years to live in the future. He was capable of earning $93.67 per month, or other large

sum. Since the infliction of said injuries he has not been able to earn any money whatever. His earning capacity has been permanently impaired; that is to say, it has been reduced four fifths of what it was prior to the infliction of said injuries.

Wherefore, the premises considered, your petitioner has been injured and damaged in manner and by means as aforesaid, in the sum of Thirty Thousand ($30,000.) Dollars.

Wherefore, your petitioner prays that process may issue out of this Honorable Court directed to the said defendant company and R. L. Cowan and Samuel Smith and J. N. Biddy, requiring them to be and appear at the next term of this Honorable Court then and there to answer your petitioner's complaint, and your petitioner will ever pray.

ATKINSON & BORN,
Petitioner's Att'ys.

Filed in office this the 10th day of November, 1911. W. W. Clarke, D. Cl'k.

28 STATE OF GEORGIA,
County of Fulton:

H. E. PUCKETT
vs.
SOUTHERN RAILWAY CO., R. L. COWAN, SAMUEL SMITH, and J. N. BIDDY.

To the Sheriff or his deputy of said county, Greeting:

The defendants are hereby required, personally or by attorney to be and appear at the City court of Atlanta, to be held in and for said county, on the first Monday in January, 1912, then and there to answer the plaintiff's complaint, as in default thereof said court will proceed, as to justice shall appertain.

Witness, The Honorable H. M. Reid, Judge of said Court, this 10th day of November, 1911.

W. W. CLARKE, *D. Cl'k.*

GEORGIA, *Fulton County:*

Served the defendant Southern Railway Co., a corporation, by serving E. H. Houseman, its depot agent by leaving a copy of the within writ and process with him in person at the office and place of doing business of said corporation in Fulton county, Ga. This Nov. 17th, 1911.

J. W. CHAMBERS,
Deputy Sh'ff.

GEORGIA, *Fulton County:*

I have this day served the defendant R. L. Cowan, Samuel Smith and J. N. Biddy each by leaving a copy of the within writ and
29 process at their several place- of residence in this county. This Nov. 17th, 1911.

J. W. CHAMBERS, *D. Sh'ff.*

(*Petition for Removal and Bond.*)

GEORGIA, *Fulton County:*

Your petitioner, the Southern Railway Company, respectfully shows to this Honorable Court.

1. That it is the defendant in the suit, which is of a civil nature and now pending; that said suit is brought to recover the sum of Thirty Thousand ($30,000) Dollars, for damages for alleged personal injuries sustained Aug. 26, 1911, at Atlanta, Ga.

2. Your petitioner further shows that said cause was instituted and begun in the city court of Atlanta by the filing of plaintiff's petition and the issuance and service of process, the said cause being returnable to the January, 1912, term, and that the time required for answering or pleading to the declaration or complaint of the plaintiff under the laws of Georgia and the rules of said court has not arrived.

3. Your petitioner further shows that this cause being of a civil nature, as aforesaid, is wholly between citizens of different States; your petitioner, who was at the time of the commencement
30 of this suit, and still is, a corporate body -corporated under the laws of Virginia, then and now a resident and citizen of the State of Virginia, and a non-resident of the State of Georgia, and plaintiff who was and still is a citizen of Georgia and of the Northern District thereof.

4. Your petitioner further shows that the said declaration or petition presents a separable controversy as between the plaintiff therein and the said Southern Railway Company, your petitioner, distinct and separate from the controversy made by the said declaration or petition between the plaintiff and other defendants, R. L. Cowan, Samuel Smith and J. N. Biddy, for that in the said second count it is alleged that at the time of the alleged injury complained of the said plaintiff and your petitioner were engaged in interstate commerce, which makes an action based and founded on the Employers' Liability Act of Congress, approved April 22, 1908, and amended April 5, 1910; and your petitioner therefore by the said second count is sought to be held liable under the said Act of Congress and the cause of action sought to be set up in the said second count being based upon the said Act of Congress presents a cause of action against your petitioner, whereas under the said Act of Congress aforesaid the other defendants joined in the said declaration or petition would not be liable to the said plaintiff under the terms of the said Act of Congress. Therefore the said declaration or petition, by vir-
31 tue of the said allegations in the said second count, presents a controversy which can be wholly determined between your petitioner and the plaintiff, H. E. Puckett, distinct and separate from any cause of action made by the said declaration between the plaintiff and the other defendants.

5. Your petitioner further shows that the controversy between your petitioner and plaintiff is monetary in character, and the sum

or value involved and in controversy therein, exclusive of interes and costs, exceeds the sum and value of $2,000 and is the sum o $30,000 as aforesaid.

6. That your petitioner desires to remove this suit before the tria thereof and to remove same into the next Circuit Court of the Unite States, to be held in the Northern District of Georgia; and your pet tioner hereby brings Illinois Surety Company, of the County o Cook, State of Illinois, as its surety for its entering into the Circu Court of the United States for the Northern District of Georgia, o the first day of its next session or before, a copy of the record in sai suit, and for paying all costs that may be awarded by the said Ci cuit Court of the United States for the Northern District of Georgi if said court should hold that this suit was wrongfully and impro erly removed thereto; and also for its appearing and entering speci bail in said suit, if special bail was originally required therei
32 and for its complying, in all respects, with the provisions o the laws of the United States in the premises, regulating th removal of causes from the State courts.

7. And your petitioner therefore prays that the said surety an bond may be accepted; that this suit may be removed into the ne Circuit Court of the United States, to be held in the Northern Di trict of Georgia, pursuant to the statutes of the United States i such cases made and provided, and that no further proceedings ma be had therein in this court; and your petitioner will ever pray.

8. Your petitioner further shows that its appearance, through i attorneys, to remove this suit is a special appearance, and does n waive its objection to the jurisdiction of the court—it being sole for the purpose of removal to said Circuit Court of the United Stat for the Northern District of Ga.

McDANIEL AND BLACK AND
ED. NEELY,
Petitioner's Att'ys.

STATE OF GEORGIA,
Fulton County:

Personally came before me H. W. Miller, who, being duly swor deposes and says that he is the Assistant to the President of defen ant, Southern Railway Company, petitioner in the foregoing pe tion for removal; that affiant knows the contents of said petitio having read the same, and said petition is true to his own knowledg except as to matters therein stated to be alleged upon info
33 mation and belief, and as to those matters he believes it be true.

Affiant further says that he is a general officer of the defendan Southern Railway Company, and is the highest officer of said d fendant in the State of Georgia and is authorized to verify the for going petition.

H. W. MILLER.

Sworn to and subscribed before me, this 19th day of Dec., 1911.
[N. P. SEAL.]
W. C. LANIER,
N. P., Fulton Co., Ga.

Bond.

In the City Court of Atlanta, Fulton County, State of Georgia.

H. E. PUCKETT
v.
SOUTHERN RAILWAY COMPANY et al.

Petition to Remove Cause to the United States Circuit Court for the Northern District of Georgia from the City Court of Atlanta.

Know all men by these presents, that we, the Southern Railway Company, as principal, and Illinois Surety Company, as surety, are held and firmly bound unto H. E. Puckett in the penal sum of One Thousand Dollars for the payment whereof, well and truly to be made unto the said H. E. Puckett, his representatives and
34 assigns, and all others whom it may concern, we bind ourselves, our heirs, our representatives, successors and assigns, jointly and severally, by these presents.

Whereas, The Southern Railway Company has filed its petition in the city court of Atlanta asking for the removal to the Circuit Court of the United States for the Northern District of Georgia, of a certain cause therein pending, wherein said H. E. Puckett is plaintiff and the Southern Railway Company is defendant:

Now, the conditions of the above obligations are such, that if the said Southern Railway Company shall enter into the said Circuit Court of the United States for the Northern District of Georgia, aforesaid, on the first day of its next session, or before, a copy of the record in the said suit, and shall well and truly pay all costs that may be awarded by said Court, if said Court shall hold that said suit was improperly removed thereto, and shall make special bail if originally required, and shall do and perform all acts required by the laws of the United States to be done by it in the removal of said suit as aforesaid, then this obligation to be void; otherwise to remain in full force and effect.

In testimony whereof we have hereunto set our hands and affixed our seals, this 19th day of Dec., 1911.

SOUTHERN RAILWAY COMPANY.
By Its Att'y, E. R. BLACK. [SEAL.]
35 ILLINOIS SURETY CO., *Surety,* SEAL.]
By E. A. NEELY, *Its General Agent.*

Executed, acknowledged and subscribed before me this 19th day of Dec., 1911.

[N. P. SEAL.] W. C. LANIER,
N. P., Fulton Co., Ga.

Justification of Surety.

STATE OF GEORGIA,
Fulton County:

In person appeared before me W. C. Lanier, a Notary Public i and for said county, E. A. Neely, who on oath says that he is a res dent of Fulton county and said State; that he is General Agent Illinois Surety Company, which Company is worth more than or thousand dollars (over and above all exceptions and claims every kind) subject to the foregoing execution.

E. A. NEELY.

Sworn to and subscribed before me this 19th day of Dec. 1911.

W. C. LANIER,
[N. P. SEAL.] *N. P., Fulton Co., Ga.*

Entry for Minutes.

STATE OF GEORGIA,
Fulton County:

H. E. PUCKETT, Plaintiff,
v.
SOUTHERN RAILWAY COMPANY et al., Defendant.

36 The Defendant, the Southern Railway Company, being th petitioner in the foregoing petition for the removal of th cause aforesaid, having within the time provided by law filed it petition for the removal of this cause to the Circuit Court of th United States for the Northern District of Georgia, and havin at the same time offered its bond in the sum of One Thousand do lars, with Illinois Surety Co. good and sufficient surety, pursuan to the statutes and conditions according to law:

Now, therefore, this Court does hereby accept and approve sai bond and accept said position, and does order that the same remai filed with the Clerk of this Court; and it is ordered that this cause b *not* removed for trial to the next Circuit Court of the United State for the Northern District of Georgia, pursuant to the statutes of th United States, and that all proceedings of and in this Court be staye and suspended.

By the Court: The petition for removal is overruled and denie Dec. 20, 1911.

H. M. REID, *Judge.*

Filed in office this the 20th Dec., 1911. T. C. Miller, D. Cl'k.

37 (*Exceptions Pendente Lite.*)

GEORGIA,
Fulton County:

Be it remembered that on the 20th day of December, 1911, before his Honor, H. M. Reid, Judge of the City Court of Atlanta, Judge then and there presiding, there came on to be heard the petition of the Southern Railway Company for the removal of the above stated case to the United States Circuit Court for the Northern District of Georgia, and that the said defendant presented a proper petition and bond for removal and that upon consideration, the said petition for removal was by the said Judge overruled and denied, to which ruling, judgment and order of the court the defendant then and there excepted and now excepts, and assigns the same as error. This defendant shows that a proper petition and bond for removal were presented within the legal limit of time and in accordance with the statutes of the United States relating thereto and that the petition for removal should have been granted and the said, cause should have been ordered removed to the said Circuit Court of the United States for the Northern District of Ga.

And now within the time allowed by law, comes the defendant and tenders this its bill of exceptions pendente lite and prays the same may be certified as true and be ordered to be entered upon the minutes and be made a part of the record in the said case.

38 McDANIEL & BLACK AND
E. A. NEELY,
Att'ys for Sou. Rwy. Co.

I do hereby certify that the above and foregoing bill of exceptions pendente lite is true. It is ordered that the same be entered upon the minutes and be made a part of the record in the above stated case. This Dec. 20th, 1911.

H. M. REID,
Judge C. C. A.

Filed in office this the 20th day of Dec. 1911. T. C. Miller, D. Cl'k.

(*Demurrer.*)

GEORGIA,
Fulton County:

Now comes the Southern Railway Co., one of the defendants in the above stated case, and without waiving its petition for removal heretofore filed therein, but relying and insisting upon same, demurs to the plaintiff's declaration upon the following grounds, to wit:

1. Because no cause of action is set out therein against this defendant.

2. Because no cause of action is set out in the first count of the said declaration against this defendant.

3. Because no cause of action is set out in the second
39 count of the said declaration against this defendant.

4. Because the said declaration is duplicitous, it being apparent therefrom that the plaintiff was an employe of an interstate railroad being a common carrier and doing an interstate business, it being alleged in the second count thereof that the plaintiff at the time of the alleged injury was engaged in interstate commerce, and that the defendant was a common carrier by railroad, engaged in interstate commerce, and if the said railroad is liable at all it would be liable under the Act of Congress approved April 22, 1908, as amended on April 5th, 1910, upon which said second count is based, which said Act supercedes the statutes and laws of the State of Georgia, upon which the first count is pre*id*cated.

5. Defendant demurs to the said declaration upon the ground that there is a misjoinder of causes of action therein.

The first count sets forth a cause of action based upon the statutes and laws of the State of Georgia and the second count sets forth a cause of action based upon the Employers' Liability Act of Congress. That the two causes of action are inconsistent and incongruous and not cumulative of each other.

Any cause of action based upon the said Act of Congress being exclusive of all other rights of action, either under the
40 common law or under the statutes and laws of the State of Ga.

6. Defendant demurs to the first count of the said declaration and moves that the same be stricken on the ground that the Act of Congress pleaded and relied upon in the second count of said declaration is exclusive.

7. Defendant demurs to the second count of the said declaration on the ground that the City Court of Atlanta has no jurisdiction to maintain an action based upon the Employers' Liability Act of Congress; that the said Act of Congress is a law of the United States, and an action based thereon can be brought only in the inferior courts of the United States organized and existing under the laws of the United States.

8. Defendant demurs to the second count of said declaration the same being based upon the Act of Congress approved April 22, 1908, as amended April 5, 1910, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in certain cases," for that the said Act of Congress is unconstitutional and void for the following reasons:

(*a*) Because the said Act of Congress aforesaid, same having been approved April 22, 1908, as amended by Act of Apr. 5, 1910, and pleaded in the said declaration, deals with and legislates upon a subject which is not within the jurisdiction of the Congress
41 of the United States. Such Acts of Congress undertake to regulate the relations of master and servant and the Constitution of the United States under which powers are delegated to Congress and which contain- subjects which Congress shall have the right to control and upon which it shall legislate does not delegate the power to legislate in this respect to Congress, and Congress has no power except those delegated to it by the constitution of the

United States the passage of said Acts was without authority or constitutional warrant.

(*b*) Said Act is further unconstitutional for the reason that it takes the property of the Southern Railway Company without due process of law, contrary to the fifth amendment to the Constitution of the United States, as follows:

"Article V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb; nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

42 Defendant's property is taken without due process of law for the reason that the said Act of Congress in the 3rd, 4th and 5th sections thereof declares different rules of law and imposedifferent and greater burdens upon interstate common carriers by railroad than are imposed on other interstate common carriers, and that thereby an unreasonable classification is made of interstate common carriers by railroad and the property of this defendant is taken without due process of law.

(*c*) Said Act of Congress is further unconstitutional and contrary to the fifth amendment of the Constitution of the United States, above quoted, for the reason that the 5th section thereof deprives it of its property without due process of law in the further particular that it unreasonably limits, regulates and deprives it of its right to contract which is a property right and in this way defendant is deprived by said Act of Congress of its property without due process of law.

9. Defendant demurs to the second count of the said declaration based upon the said Act of Congress on the ground that there is a misjoinder of parties defendant, the said Act of Congress giving no right of action against a co-employee of the said plaintiff.

10. Defendant specially demurs to paragraph 12, and moves to strike the same on the ground that the allegations therein con-

43 tained are irrelevant and immaterial.

11. Defendant specially demurs to paragraph 13 on the ground that the allegations therein contained are irrelevant and immaterial.

12. Defendant specially demurs to paragraph 14, on the ground that it is not shown wherein it was the duty of petitioner to rescue O'Berry, and on the further ground that the allegations as to the rescuing of the said O'Berry are irrelevant and immaterial.

13. Defendant specially demurs to paragraph 34 and moves to strike therefrom the words: "He was capable of earning $93.67 per month, or other large sum," the said allegation being irrelevant and immaterial, and not being based upon the actual earnings of the petition-.

14. Defendant specially demurs to paragraph 43 on the ground

that the allegation therein contained is a conclusion and is vague, indefinite and uncertain, it not being shown in what manner the said Southern Railway Co., was engaged in interstate commerce at the time of the alleged injury.

15. Defendant specially demurs to paragraph 44 on the ground that the said allegation therein contained is a conclusion; and further, on the ground that the same is vague, indefinite and uncertain, it not being sufficiently set forth in what manner the petition- was engaged in interstate commerce at the time of the alleged injury.

44 16. Defendant specially demurs to paragraph 48 on the ground that the allegations therein contained are irrelevant and immaterial.

17. Defendant specially demurs to paragraph 49 on the ground that the allegations therein contained are irrelevant and immaterial.

18. Defendant specially demurs to paragraph 50 on the ground that it is not shown how it became the duty of petitioner to rescue the said O'Berry or assist in clearing away said track, and upon the further ground that the said allegation is irrelevant and immaterial.

19. Defendant specially demurs to paragraph 55, and moves to strike the words "So as to reach the scene of the collision at the point where O'Berry was pinned beneath the box car," said allegation being irrelevant and immaterial.

20. Defendant specially demurs to paragraph 70 and moves to strike therefrom: "He was capable of earning $93.67 per month or other large sum," the said allegation being irrelevant and immaterial, and not being an allegation of the petitioner's actual earnings.

Wherefore the dismissal of said suit is prayed.

45 McDANIEL & BLACK AND
E. A. NEELY,
Att'ys for Def't So. Ry. Co.

Filed in office this the 29th day of Dec., 1911. W. W. Clarke, D. Cl'k.

(*Answer.*)

GEORGIA, *Fulton County:*

Now comes the Southern Railway Company, one of the defendants in the above stated case, and without waiving its petition for removal or its demurrer heretofore filed therein, and makes answer to the plaintiff's declaration and says:

First Count.

1. For want of sufficient information defendant is unable to either admit or deny the allegations of paragraphs 1, 2 and 3.

2. Defendant admits paragraph 4.

3. Defendant denies paragraph 5.

4. For want of sufficient information defendant is unable to either admit or deny paragraph 6.

5. Defendant denies paragraph 7.

6. For want of sufficient information defendant is unable either to admit or deny paragraphs 8, 9, 10, 11, 12, 13, and 14.

7. Defendant admits paragraph 15.

46 8. For want of sufficient information defendant is unable either to admit or deny the allegations contained in paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26.

9. Defendant denies paragraphs 27, 28, 29.

10. For want of sufficient information defendant is unable either to admit or deny paragraph 30.

11. Defendant denies paragraphs 31, 32, 33.

12. For want of sufficient information defendant is unable either to admit or deny paragraph 34.

Second Count.

1. For want of sufficient information defendant is unable either to admit or deny paragraphs 35, 36, 37.

2. Defendant admits paragraph 38.

3. Defendant denies paragraph 39.

4. For want of sufficient information defendant is unable either to admit or deny paragraphs 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50.

5. Defendant admits paragraph 51.

6. For want of sufficient information defendant is unable either to admit or deny paragraphs 52, 53, 54, 55, 56, 57, 58, 60, 61, 62.

7. Defendant denies paragraphs 63, 64, 65, 66, 67, 68, 69.

47 8. For want of sufficient information defendant is unable either to admit or deny paragraph 70.

9. For further answer in this behalf, this defendant denies that it has been guilty of any of the acts of negligence charged in the said declaration, and denies that it has injured and damaged the petitioner in the sum set forth in said declaration or of any sum whatever.

10. For further answer in this behalf this defendant says that in the second count of the said declaration it is alleged that the plaintiff and this defendant were engaged in interstate commerce at the time of the alleged injury, which makes a cause of action based upon the Employers' Liability Act of Congress approved April 22, 1908, as amended April 5th, 1910, and this defendant shows that the said Act of Congress is unconstitutional and void for the following reasons, to wit:

(*a*) Because the said Act of Congress aforesaid, same having been approved April 22, 1908, as amended by Act of April 5th, 1910, and pleaded in the said declaration, deals with and legislates upon a subject which is not within the jurisdiction of the Congress of the United States. Such Act of Congress undertakes to regulate the relation of master and servant, and the Constitution of the United States under which powers are delegated to Congress and which

SE IN CENTER

contain- subjects which Congress shall have the right to con-
48 trol and upon which it shall legislate does not delegate the power to legislate in this respect to Congress, and Congress has no powers except those delegated to it by the Constitution of the United States the passage of said Act was without authority or constitutional warrant.

(*b*) Said Act is further unconstitutional for the reason that it takes the property of the Southern Railway Company without due process of law, contrary to the fifth amendment to the Constitution of the United States, as follows:

"Article V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy for life or limb; nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Defendant's property is taken without due process of law for the reason that the said Act of Congress in the 3rd, 4th and 5th sections thereof declares different rules of law and impose- different and greater burdens upon interstate common carriers by railroad
49 than are imposed on other interstate common carriers and that thereby an unreasonable classification is made of interstate common carriers by railroad and the property of this defendant is taken without due process of law.

(*c*) Said Act of Congress is further unconstitutional and contrary to the fifth amendment of the Constitution of the United States, above quoted, for the reason that the 5th section thereof deprives it of its property without due process of law in the further particular that it unreasonably limits, regulates and deprives it of its right to contract which is a property right, and in this way defendant is deprived by said Act of Congress of its property without due process of law.

McDANIEL & BLACK,
E. A. NEELY,
Att'ys for Def't.

Filed in office this the 29th day of Dec. 1911. W. W. Clarke, D. Cl'k.

(Order on Demurrer.)

The within demurrer coming on to be heard paragraphs 9, 14 and 15 of the demurrer are sustained.

The names of the defendants other than the Railway Company are stricken from the second count and the suit on the sec-
50 ond count is dismissed as to the said R. L. Cowan, Samuel Smith and J. N. Biddy.

The plaintiffs shall have 10 days in which to amend the paragraphs to which special demurrers are sustained.

Plaintiff shall have 10 days within which to elect to strike either ount No. 2 of the declaration or to strike Cowan, Smith and Biddy is defendants in Count No. 1, otherwise the demurrer is overruled. This January 6, 1911. (2).

H. M. REID, *Judge.*

(Exceptions Pendente Lite.)

GEORGIA, *Fulton County:*

Be it remembered that on the 6th day of January, 1912, there ame on to be heard before His Honor, H. M. Reid, the demurrer of the defendant, the Southern Railway Company, to the declaration of the plaintiff in the above stated case and that after argument the court entered the following order:

"The within demurrer coming on to be heard, paragraphs 9, 14 and 15 of the demurrer are sustained.

The names of the defendants other than the Railway Company are stricken from the second count and the suit on the second count is dismissed as to the said R. L. Cowan, Samuel Smith and J. N. Biddy.

The plaintiffs shall have ten days in which to amend paragraphs to which special demurrers are sustained.

51 Plaintiff shall have ten days within which to elect to strike Count No. 2 of the declaration or to strike Cowan, Smith and Biddy as defendants in Count No. 1, otherwise the demurrer is overruled.

This Jan. 6th, 1912.

H. M. REID, *Judge.*"

To the ruling, judgment and order of the Court in overruling the grounds of demurrer not specifically sustained by the foregoing order the defendant then and there excepted and now excepts and assigns the same as error and for specific assignment of error this defendant avers that the said demurrer should have been sustained upon each and every general and special ground thereof.

And now within the time allowed by law comes the defendant and files this its bill of exceptions pendente lite and prays that the same may be certified as true and be ordered to be placed upon the minutes and be made a part of the record in the above stated case.

McDANIEL & BLACK AND
E. A. NEELY,
Atty's for Def't.

I do certify that the foregoing bill of exceptions pendente lite is true. It is ordered that the same be entered upon the minutes and be made a part of the record in the above stated case.

This January 10th, 1912.

H. M. REID,
Judge C. C. A.

52 Filed in office this the 10th day of January, 1912. T. C Miller, D. Cl'k.

(Amended Petition.)

GEORGIA, *Fulton County:*

Now comes the plaintiff in the above stated case, and in compli ance with the order of the court, passed upon the demurrer file therein, amends the declaration filed therein, as follows:

First.

By striking count No. 1.

Second.

By striking paragraphs 35, 36 and 37 in count No. 2.

Third.

By striking Paragraph 39 and substituting in the place thereo the following: "That the said defendant, the Southern Railwa Company has injured and damaged your petitioner in the sum Thirty Thousand (30,000) Dollars, and that your petitioner avers

Fourth.

By adding to the second count, paragraph 43*a*, which is as fo lows: "That on the occasion herein referred to, the engine and ca hereinafter referred to, upon which A. P. O'Berry was at work, a is herein set out, were engaged in interstate commerce; th
53 the engine with which the said A. P. O'Berry was makin up freight train, known on the defendant's schedule as Trai No. 75, whose destination was Birmingham, Alabama, and al freight train, known on defendant's schedule as train No. 87, who destination was Chattanooga, Tenn. That the following cars we being put in said Train No. 75, at the time of the aforesaid collisio The initials and numbers of each of the said cars are herein set ou as follows, to wit:

Sou. 51009 F. E.	Sou. 11985 B. E.
" 54087 G. E.	" 18155 "
" 115703 F. E.	L. & N. 4763 B. L.
" 51754 F. E.	Sou. 30680 V. L.
" 183705 G. E.	C. & O. 4819 B. L.
P. L. 517117 B. E.	M. & O. 78659 B. F.
N. O. M. & C. 1225 B. E.	C. R. & P. 3732 B. E.
I. C. 11984 B. E.	Sou. 33775 V. L.
Sou. 38527 V. L.	" 11852 B. L.
" 137761 B. E.	A. G. S. 11852 B. L.
" 25669 V. E.	Sou. 136613
" 16524 B. E.	Sou. 37035 V. L.

I. C. 34248 B. E.
W. C. 17940 B. L.
Sou. 131956 "
Sou. 23936 V. L.
Sou. 132492 B. L.
B. & M. 60437 "
A. & V. 21059 "
A. T. & S. F. 43161 B. L.
Sou. 39243 V. L.
Sou. 12584 B. L.
Sou. 14994 B. L.

The said train No. 75 was due to leave Atlanta for Birmingham at 11:30 P. M. About fifteen of the cars out of the above named list of cars were coupled to the aforesaid engine at the time of the said collision.

By adding to the second count, paragraph 43*b*, as follows: The exact cars coupled to said engine at the time of the aforesaid collision, your petitioner is not advised, but the same were cars
54 which were to be placed by the said engine and crew in the aforesaid train No. 75.

By adding to the second count, paragraph 43*c*, as follows: it being your petitioner's duty in obedience to the instructions of the defendant company to aid and assist in releasing the said A. P. O'Berry from his perilous position, which is hereinafter referred to, and also to aid and assist in jacking up the car and thereby releasing said A. P. O'Berry from the danger to which he was exposed, as is hereby set out, and it was in obedience to the instructions of the defendant company, your petitioner's duty to aid and assist the crew of said switch engine in moving and clearing up said collision and in moving said interstate cars so as to enable the crew with which A. P. O'Berry was at work to finish making up said freight train No. 75, which was an interstate train, as aforesaid.

By adding to the second count paragraph 44*a*, as follows: That at the time of the infliction of said injuries upon your petitioner as is herein set out, your petitioner was engaged in and about the work and movement of interstate cars, as is hereinbefore set out, and your petitioner was engaged in interstate commerce as aforesaid. That the engine and cars referred to at the time your petitioner was injured, as hereinafter set out, were engaged in interstate commerce as aforesaid.

55 By adding to the second count paragraph 47*e*, as follows: That the said defendant company, at the time of the infliction of the injuries upon your petitioner, as aforesaid, was engaged in interstate commerce as aforesaid.

Fifth.

By striking paragraphs 45, 46 and 47 from count 2 of said declaration.

Sixth.

By striking the words "the said" in line one of paragraph 60.

Seventh.

By striking the words "the said" in line one of paragraph 61.

Eighth.

By striking the words "the said" in line one of paragraph 62.

Ninth.

By striking paragraph 63 and substituting in the place thereof, the following:

That the said defendant company was negligent in that the said old cross ties were lying in manner and place alongside of said track as aforesaid.

56 Tenth.

By striking paragraph 64, and substituting in the place thereof, the following: that the said Southern Railway Company was negligent in that said three large clinkers were on said road bed in manner and place as aforesaid.

Eleventh.

By striking paragraph 65 of said declaration, and substituting in place thereof, the following: That the said Southern Railway Company was negligent in that the said grass had grown up on said road bed, as aforesaid.

Twelfth.

By striking from paragraph 70 of said declaration in lines four and five, the words "or other large sum."

Thirteenth.

By striking from the prayer in said declaration, the following words in the fourth and third lines from bottom of same, namely, to wit: "R. L. Cowan, and Sam'l Smith and J. N. Biddy."

Fourteenth.

Plaintiff in obedience to the order passed by this Honorable Court elects to strike count No. 1 from the declaration filed therein, and relies upon Count No. 2 as amended.

ATKINSON & BORN,
Pl'ff's Att'ys.

57 Allowed and ordered filed. This 7th day of June, 1913.

H. M. REID,
Judge C. C. A.

Filed in office this the 7th day of June, 1913. S. T. Conyers, D. Cl'k.

(*Demurrer.*)

GEORGIA, *Fulton County:*

Now comes the defendant, by its counsel, McDaniel and Black, and shows to the court that heretofore, to wit: on the 10th day of November, 1911, the original petition in this cause was filed, and that on the 30th day of December, 1911, this defendant duly filed its general and special demurrer to the original petition as filed, and on the 6th day of January, 1912, said general and special demurrers were heard by this court and order of the court duly had and entered thereon. That thereafter, to wit, on the 18th day of January, 1912, this defendant presented to this court its bill of exceptions pendente lite, excepting to the said order of this court as entered on the said demurrers of this defendant, and said bill of exceptions pendente lite were duly signed and certified by this court and filed on the 18th day of January, 1912; and that thereafter, to wit, on the 7th day of June, 1913, plaintiff filed in this cause two amendments to his original petition, which amendments materially change his cause of action as originally filed; and defendant now and
58 herein renews his demurrers to the petition as amended and to the petition and amendments and for grounds of demurrer says:

1. That no cause of action is set out in the petition with its amendments.

2. That the petition as amended is filed under the Act of Congress of date April 22, 1908, known as the Federal Employers' Liability Act, and that the petition and amendment shows that the petition as amended cannot be maintained under that Act, for the reason that plaintiff was not engaged in interstate commerce at the time of his alleged injury.

4. Defendant demurs specially to that part of paragraph 4 of the amendment which is as follows:

"That at the time of the infliction of said injuries upon your petitioner, as is herein set out, your petitioner was engaged in and about the work and movement of interstate cars as is hereinbefore set out, and your petitioner was engaged in interstate commerce as aforesaid.

That the engine and cars referred to at the time your petitioner was injured, as hereinafter set out, were engaged in interstate commerce, as aforesaid," on the ground that said portion of said paragraph 4 is a mere conclusion and is indefinite and uncertain and does not show how nor wherein petitioner was engaged in
59 interstate commerce, nor what work nor what movement of interstate cars is referred to, nor how nor wherein he was engaged in any such work or movement, nor how nor wherein he was at work upon said engine or cars referred to, nor how nor wherein the said engine and cars were engaged in interstate commerce.

5. Defendant demurs specially to that portion of paragraph 4 of the amendment which reads as follows:

"That the said defendant company, at the time of the infliction of the injuries upon your petitioner, as aforesaid, was engaged in interstate commerce as aforesaid." on the ground that said language is a mere conclusion of the pleader and sets forth no facts showing that defendant company was engaged in interstate commerce.

Wherefore, Defendant prays that this its general and special demurrers be sustained and said cause be dismissed.

McDANIEL AND BLACK,
Att'ys for Def't.

Filed in office this the 7th day of June, 1913. S. T. Conyers, D. Cl'k.

(*Order.*)

The foregoing demurrer having been heard, and argument of counsel had thereon, it is ordered that the demurrer be overruled upon each and every ground thereof.

This June 7th, 1913.

H. M. REID, *Judge.*

60 (*Plaintiff's Amendment.*)

GEORGIA, *Fulton County:*

Now comes the plaintiff in the above stated case, and with leave of the court first had and obtained, amends the amendment to the said declaration which has heretofore been allowed and filed by adding at the end of Paragraph 43-C of said amendment the following to wit:

"Which were instructions given orally to the plaintiff by A. J. Gilleland, who was Chief Car Inspector of the defendant company and under whom your petitioner was at work at the time he was injured as aforesaid, and whose orders your petitioner was in duty bound to obey, and the said Gilleland had full authority to give the said instructions to your petitioner."

ATKINSON AND BORN,
Petitioner's Att'ys.

Allowed and ordered filed. This 7th day of June, 1913.

H. M. REID,
Judge C. C. A.

Filed in office this the 7th day of June, 1913. S. T. Conyers D. Cl'k.

61 (*Amendment to Par.* 32.)

GEORGIA, *Fulton County:*

The plaintiff now comes and amends his declaration filed in the above entitled action by adding to paragraph thirty-two thereof the following to be designated as "Paragraph 32-A."

And your petitioner further avers that prior to the infliction of the said injuries he was able to and did in the prosecution of his daily work use his legs in a perfectly normal manner, they being of equal length and sustaining in equal proportion the weight of his body, but that since the infliction of the said injuries and as a consequence thereof his left leg has been so shortened and the hip joint thereof has become so out of adjustment as that he is now compelled to place almost the entire weight of his body upon his right leg, so that while standing firmly on his right foot his left will not reach the ground by one inch and a half or more, that his back and spinal column have been twisted and distorted so that he cannot as therebefore stand in an erect and upright position with both feet on the ground at the same time, so that your petitioner is now and henceforth will continue to be a permanent and helpless cripple, and petitioner prays this amendment be allowed.

ATKINSON AND BORN,
Atty's for Pl'ff.

We acknowledge due and legal service of notice of the
62 foregoing amendment, waive copy and all other and further service of the same.

McDANIEL AND BLACK,
Att'ys for Def't.

Amendment allowed. This March 9th, 1914.

H. M. REID,
Judge C. C. A.

Filed in office this the 9th day of March, 1914. S. T. Conyers, D. Clk.

(*Amendment by Defendant.*)

GEORGIA, *Fulton County:*

Now comes the defendant the Southern Railway Company by its counsel McDaniel and Black and amends its plea in this cause filed, and for amendment avers.

1. Defendant denies paragraph three of amendment of plaintiff filed June 7, 1913.

2. In response to paragraph four of plaintiff's amendment filed June 7th, 1913, defendant avers: (1) That at the time A. P. O'Berry was injured the engine with which he was working had attached to it one empty car which was sent to the repair track, and one loaded car whose destination was Eastman, Ga. (2) Defendant denies the other allegations of said paragraph four of said amendment.

3. Defendant denies all the other allegations contained in
63 paragraphs nine, ten and eleven of said amendment.

McDANIEL AND BLACK,
Att'ys for Def't.

GA., *Fulton County:*

Personally before me a Notary Public in and for said county appears W. G. Anderson who being sworn says that he is agent of Southern Ry. Co., and that the foregoing amendment is true and that the allegations therein contained were not omitted from the original answer for the purpose of delay, and that this amendment is not now offered for the purpose of delay.

W. G. ANDERSON.

Sworn to and subscribed before me, this 9th day of Mareh, 1913.

S. T. CONYERS,
N. P., Fulton Co., Ga.

Filed in office this the 9th day of March, 1914. S. T. Conyers D. Cl'k.

64 (*Amendment by Petitioner.*)

GEORGIA, *Fulton County:*

Your petitioner further amends paragraph 43 of his petition by adding after said paragraph as amended the following:

Your petitioner alleges that on the date of the collision mentioned in paragraph 48 of the original declaration your petitioner being then and there in the employment of the defendant company in the capacity of inspector of cars in its said yards, his duties required him among other things to inspect cars engaged in interstate traffic; that at the exact time of said collision and for some time theretofore he had been engaged in inspecting cars which were to be incorporated in train No. 75 of the defendant, which was scheduled to leave Atlanta that night carrying through freight over the line of the defendant's road to Birmingham and other points in the State of Alabama; that at the time of the happening of said collision he had already inspected twenty or twenty-five of the cars destined to compose said train and these cars had been placed on the track at which the train was to be made up and that he was then at the instant of said collision engaged in making out a record of his said inspection when his work in making out said record and in inspecting the remainder of said cars, that is to say, twelve or fifteen additional cars which were to be incorporated in

65 train No. 75, was interrupted by the collision aforesaid happening and blocking the track over which the remainder of said cars were to pass in order for him to inspect them so that said cars could not pass over said track but were compelled to be detoured over another track; that in consequence of the injuries in the petition mentioned sustained in manner and by means in his petition stated, he was for the time being wholly disabled and was unable to complete the inspection of the remainder of the cars destined to and which thereafter did go into said interstate train No. 75 as aforesaid and that as a consequence of the injuries sustained as aforesaid not only was he so unable to complete the

task of inspecting the said cars in which duty he was specially engaged at the time aforesaid, but the departure of the train upon its scheduled time was delayed for a space of one hour and other long time, thus impeding and interrupting and delaying the said interstate train upon its journey, and so your petitioner alleges that he was thus and in manner aforesaid at the time aforesaid engaged in interstate commerce.

ATKINSON AND BORN,
Att'ys for Pl'ff.

We acknowledge due and legal service of the foregoing amendment, waive copy and all other and further service of the same.
April 6th, 1914.

McDANIEL AND BLACK,
Att'ys for the Def't.

66 Amendment allowed and ordered filed over objection of deft. April 6th, 1914.

H. M. REID, *Judge.*

Filed in office this the 6th day of April, 1914. S. T. Conyers, D. Clk.

(Verdict.)

We the Jury find for the Plaintiff ($7,250.) Seven Thousand Two Hundred and Fifty Dollars.
This 4/7/1914.

J. M. COCHRAN, *Foreman.*

(Judgment.)

The jury having found for the plaintiff H. E. Puckett against the defendant Southern Railway Company in the sum of Seventy-two Hundred Fifty and no/100 ($7,250) Dollars. It is therefore considered, ordered and adjudged that the said plaintiff H. E. Puckett, do have and recover of and from the said defendant Southern Railway Co., the sum of Seventy-two Hundred Fifty and no/100 ($7,250) Dollars, together with the costs of suit.
This 9th day of April, 1914.

ATKINSON AND BORN,
Attorneys for Plaintiff.

67 *(Exceptions Pendente Lite.)*

GEORGIA, *Fulton County:*

Be it remembered that the above case was put upon trial at the March Term 1914 of the city court of Atlanta, and that during the progress of said trial, to wit: on April 3, 1914, after the plaintiff had introduced all of his evidence and closed his case, the defendant, Southern Railway Company, moved for a nonsuit upon the ground

SE IN CENTER

that the plaintiff had failed by his evidence to sustain the case mad by his petition and the amendment thereto in the following particu lars:

1. Because the plaintiff had failed to show by his evidence tha he was employed in interstate commerce at the time of his allege injury for which suit was brought.

2. Because the plaintiff had failed by his evidence to show tha the defendant was guilty of the acts of negligence charged in th petition.

Which motion for nonsuit the court did then, on the 3rd day o April, 1914, overrule, and such ruling of the court overruling thi motion for nonsuit Southern Railway Company then excepted t and now excepts to the same and assigns the same as error, and fo specific assignment of error defendant says that the court shoul have sustained its motion and nonsuited the plaintiff's ca
68 for the reason that plaintiff did not show by his evidence tha he was employed in interstate commerce at the time of hi alleged injury and therefore entitled to bring his suit under the Ac of Congress of 1908 as amended by Act of Congress of 1910, com monly know as the Federal Employers' Liability Act; and for th further reason that plaintiff did not show by his evidence that th defendant was guilty of actionable negligence.

Be it further remembered that during the progress of said tria to wit: on April 6th, 1914, plaintiff, H. E. Puckett, presented a amendment to his petition, which amendment defendant, Souther Railway Company, objected to upon the ground that the same di not in and of itself show and did not in connection with the alleg tions in the original petition and the amendments thereto show th plaintiff was engaged in interstate commerce at the time of hi alleged injuries and thereby entitled to the benefits of the Act o Congress of 1908 and the amendment thereto generally known a the Federal Employers' Liability Act. The court overruled th defendant's objection to the said amendment allowing the sam which ruling and order of the court allowing said amendmen Southern Railway Company then and there excepted to and no excepts to the same and assigns the same as error, and for specif assignment of error the Southern Railway Company says that sa amendment should have been disallowed for the reason
69 stated in the objections which Southern Railway Compan made thereto.

After the allowance of said amendment Southern Railway C renewed its general demurrer to the declaration as amended an urged the dismissal of plaintiff's suit upon the ground that the pe tion as amended did not by its allegations show that the plaint H. E. Puckett, was engaged in interstate commerce at the time his alleged injury so as to bring him within the purview and entitle him to the benefits of the Act of Congress of 1908 as amend generally known as the Federal Employers' Liability Act. Th court overruled defendant's demurrer to the declaration as amende which ruling, order and judgment of the court Southern Railwa Company then excepted to and now excepts to the same and assig

the same as error, and for specific assignment of error Southern Railway Company says that its demurrer to plaintiff's petition which was urged after the allowance of his amendment on April 6th, 1914, should have been sustained and that plaintiff's petition should have been dismissed upon all the grounds of such general demurrer, including the ground that the allegations of the petition as amended did not show that plaintiff was employed in interstate commerce at the time of his alleged injury.

And now Southern Railway Company, at the same term of court at which the rulings, judgment and orders complained of
70 were made, and within the time allowed by law, presents this its exceptions pendente lite and prays that the same may be certified, allowed ordered filed and made a part of the record in the case.

McDANIEL & BLACK,
EDGAR A. NEELY,
Att'ys for Sou. Ry. Co.

I do certify that the foregoing exceptions pendente lite are true, the recital of facts therein contained being correct. Such exceptions pendente lite are hereby allowed, ordered to be filed and made a part of the record in the case.

April 10, 1914.

H. M. REID,
Judge C. C. A.

Filed in office this the 10th day of April, 1914. S. T. Conyers, D. Cl'k.

(*Motion for New Trial.*)

GEORGIA, *Fulton County:*

Southern Railway Company, defendant, being dissatisfied with the verdict and judgment in said case, comes now, at the term at which the trial was had and before the adjournment thereof, and within thirty days from such trial and within the time allowed by law, and moves the court for a new trial upon the following grounds, to wit:

71 1. Because the verdict is contrary to the evidence and without evidence to support it.

2. Because the verdict is decidedly and strongly against the weight of the evidence.

3. Because the verdict is contrary to law.

4. Because the verdict is excessive in amount.

Wherefore, movant, Southern Railway Company, prays that these its grounds for new trial be considered and inquired of by the court and that said verdict be set aside and a new trial ordered in the case.

McDANIEL AND BLACK,
EDGAR A. NEELY,
Att'ys for Movant, Sou. Ry. Co.

SE IN CENTER

The foregoing motion for new trial read and considered. The grounds thereof are approved.

It is ordered that the plaintiff H. E. Puckett, show cause before me on the 9th day of May 1914, why the foregoing motion should not be granted, the verdict rendered set aside and a new trial ordered.

It is further ordered that this motion for new trial and order shall operate as a supersedeas and that judgment shall be stayed and execution shall not be issued until the further order of the court vacating such supersedeas and revoking said stay.

Let the said H. E. Puckett or his counsel be served with a
72 copy of this motion and order.

It is further ordered that the movant shall have until the actual hearing of this motion (whether heard at the date above set or at a future date thereafter, either in term or vacation) in which to prepare, have approved and to file brief of the evidence introduced upon the trial of the case. Movant shall further have the right to amend its motion for new trial and by amendment to add further grounds thereto.

This April 10th, 1914.

H. M. REID,
Judge C. C. A.

Due and legal service of the above and foregoing motion for new trial and rule nisi is hereby acknowledged. Copy received. All other and further service waived.

This April 10, 1914.

ATKINSON AND BORN,
Att'ys for H. E. Puckett.

Due and legal service of the within and foregoing motion for new trial and rule nisi is hereby acknowledged. Copy received. All other and further notice and service waived.

This April 18th, 1914.

ATKINSON AND BORN,
Att'ys for H. E. Puckett.

Filed in office this the 10th day of April, 1914. S. T. Conyer D. Cl'k.

73 (*Amended Motion.*)

GEORGIA, *Fulton County*:

Now comes the defendant and movant, Southern Railway Company, and amends its motion for new trial in this case and moves that a new trial be granted it upon the following additional grounds:

1. Because the court erred in the following portion of its charge to the jury:

"The law directs, gentlemen, that it is your duty, where it can be done, to so reconcile conflicting evidence, if there be such in the case, as all the witnesses will be made to speak the truth and pe

jury be imputed to none of them. But if there should be any evidence in the case in such irreconcilable conflict that this cannot be done, you would then believe the evidence most reasonable and most credible to you, and settle the issues by the greater weight or preponderance of the evidence."

Movant contends that this charge was error, because the jury was instructed by the court in mandatory form as to what evidence they should believe in event of an irreconcilable conflict in the testimony, and in this way were instructed in absolute terms what evidence they should believe where a conflict existed in the testimony which could not be reconciled; whereas movant contends that the court could not commit the jury to any precise and absolute method of solving irreconcilable conflicts in evidence.

74

2. Because the court erred in the following portion of its charge to the jury:

"If this plaintiff, gentlemen, at the time as alleged by him was engaged in making up, as car inspector, a train that was to go beyond the limits of the State and carry freight beyond the limits of the State of Georgia, he would have been engaged in interstate commerce. And if you believe he was so engaged and while so engaged there was a sudden emergency in connection with an injury to O'Berry (whose name is set forth in the petition, another employee) that in the discharge of his duty under the rules and instructions from one in authority he represented the company while in an effort to release O'Berry and in a further effort to clear the track for the movement of cars that were to go into Train 75 with its other cars, with the present intention of returning immediately to the work in which he had just been engaged, he would still, during that period, be engaged in interstate commerce and have the right to maintain this action and recover, if otherwise entitled to recover in the case."

Movant contends that this charge of the court was error in that, according to its contention, the fact that Puckett may have been engaged in interstate commerce prior to the time he entered upon the work of rescuing O'Berry in connection with the fact that he intends later to resume duties in connection with interstate commerce would not be the test of his engagement in interstate commerce at the time of his alleged injury; but as movant respectfully contends, the work upon which he was engaged at the time of his alleged injury, independent of his prior engagement and of his future intention, determines whether he was engaged in interstate commerce so as to come within the scope, purview or benefits of the Act of Congress of April 26th, 1908, the same being "An Act relating to Liability of Common Carriers by Railroad to their Employees in Certain Cases," which as amended by the Acts of Congress approved April 5th, 1910, is generally known as "The Federal Employers' Liability Act"; and movant contends that in giving this instruction to the jury the court:

5

(*a*) erroneously construed the said Act of Congress above referred to, and erred in holding contrary to movant's contention that Puckett was engaged in interstate commerce under the stated conditions; and (*b*) gave an erroneous application to the said federal law in question;

(c) and further erred because he was nor warranted in including in the instructions above quoted this extract, "and in a further effort to clear the track for the movement of cars that were
76 to go into Train 75 with its other cars," the plaintiff having produced no evidence to support the allegation made in an amendment to his original petition, in substance, that he was engaged in an effort to clear the particular track for the passage of cars to be put in train 75, and movant having explicitly denied such allegation.

3. The court erred in including in that portion of its charge quoted and excepted to in the second ground of this amended motion the following language, to wit:

"And in a further effort to clear the track for the movement of cars that were to go into Train 75 with its other cars."

Movant contends that the submission of this issue was erroneous in that it was unsupported by any evidence, the allegation in respect thereto in an amendment of plaintiff's petition having been expressly denied by defendant. Movant further contends that, in event this submission to the jury could be justified, it was error to submit only a single alternative, to wit: plaintiff's contention, without at the same time stating and submitting the contrary contention which the movant had made by its answer and supported by its evidence.

4. Because the court erred in admitting over objection of movant the following rules of defendant company in evidence:

"Rule 816. They must not allow lumber, timber, ties, rails, or other freight or material to be piled within ten feet of the
77 track or within seven feet of any side track.

Rule 852. They must not allow lumber, timber, ties, rails or other freight or material to be piled or placed upon the ground within ten feet of the main track or seven feet of any side track, and must see that all such freight or material left near the tracks is so placed that it cannot fall upon or near them."

(Rule 816 is addressed to Track Supervisor, and Rule 852 is addressed to Track Foreman.)

Movant objected to the admission of these rules upon the ground that the same showed upon their face, by their context, and by the conjunction with other rules, that they were not intended to apply to yards, such as the one in which Puckett claimed to have sustained his injuries, but that their application and requirements are confined to the main lines of the company and sidings between terminals. Movant further objected to the admission of said rules upon the further ground, that, when considered in connection with Rule 796 addressed to Yard Masters, as follows:

"Rule 796. They must see that their yards are kept in good order that links, pins, scrap and other material scattered upon the ground are promptly collected and stored and that nothing is allowed to remain upon or between the tracks that involves risk to property or persons."

it was apparent that the duty of keeping a yard, such as the
78 in which Puckett sustained his alleged injury, devolved upon an agent of defendant company other than Track Foreman

and Track Supervisor, to wit: the Yard Master as against whom no negligence was charged; and movant respectfully contends that the objection which it made to the admission in evidence of the two rules in question should have been sustained and that the court erred in admitting said rules in evidence.

McDANIEL AND BLACK,
Movant's Att'ys.

The foregoing amendment to motion for new trial filed by Southern Railway Company is hereby allowed. The grounds of said amended motion, as well as those contained in the original motion, are hereby approved. The recitals of fact in the original and amended motion are true and correct.

H. M. REID,
Judge C. C. A.

Due and legal service of the foregoing amendment to the motion for new trial is acknowledged. Copy received. All other and further service waived. June 23rd, 1914.

ATKINSON AND BORN,
Att'ys for H. E. Puckett.

Filed in office 23 June, 1914. S. T. Conyers, D. Cl'k.

79 (*Order Overruling.*)

After hearing argument upon the foregoing motion for new trial and the amendment thereto, it is ordered that the same be and is hereby overruled and said motion denied.

This June 23rd, 1914.

H. M. REID, *Judge.*

80 (*Brief of Evidence.*)

H. E. PUCKETT, Plaintiff, Sworn testified:

My name is H. E. Puckett. I was engaged on the 26th day of August, 1911 as car inspector for the Southern Railroad in the North Inman Yards in Fulton County, Georgia. The night I was hurt I had inspected a part of 75 train to Birmingham, Alabama. This train consisted of merchandise, sometimes empty cars,—a through freight train. I was injured that night helping a man, switching up merchandise to go into this train. This engine that was switching the merchandise from what they call the transfer, up there switching the cars to go into train 75, while they were switching those cars on ahead, they got up there and run into a cut of cars. The cars next to the engine were empty, a few cut of cars and the engine run up into those cars. The switchman was sitting on the end sill, and the engine come against the car and he was caught under this car and the car caught afire by the bursting of the headlight. I

heard the fuss and began to run up there and I met Walter Lindsay and he said that Chappell had killed O'Berry. I went up there and looked at it and I said—Are you all going to let this man die this way. I had a conversation with them about the man's condition. Lindsay was the Yard Conductor. He had charge of making up 75 train. I told Mr. Lindsay—Are you going to let this man
81 die? Walt said—Henry you go over there and get the jacks you know where to get them. A jack is a mechanical device for lifting cars. He said—You know what kind of jack to get and go and get it. I said to Mr. Lindsay—You will have to let me have some men to go over there with me, and there were three, one was Lee, and I don't know the other man's name, and one was a negro. It was a thirty-five ton jack. I showed them where to get it, and I left them up there with the jack. I went over to a pile of blocks about thirty or forty feet from the jack and picked up two of the big blocks. One pine block was six inches by 15 inches, about three and a half feet long. The other was oak and was six inches by nine inches, about three feet long. I put the blocks on my shoulder and ran down the outside of track No. 27.

As I was going down the track, I got down in about a car length and a half of the engine, I struck some clinkers, the first thing that started me—I struck those and kind of stumbled and I struck some old crossties and that shot my foot under one and I couldn't pull it out from under it, and it jerked me and threw me right face foremost and my right foot went that way, and my left was back this way, and it made me spring up in my back and the blocks fell right on top of me—across my back. I stumbled around there—I don't know how—I twisted around there and got one of the blocks
82 by me, and I pulled up by the side of this on a car and I commenced to feeling around there and got my lamp and lit it and set it on the cross ties. I looked and examined the crossties after I lighted my lamp. I looked around there. I picked up that smallest block and it had a spike in the end of it that stuck out about four inches and I pulled this block up and I took hold of the spike and I followed it around, going on down there, and I got there and I made them put the jack under the end to get the boy out.

I shined my light around and I seen that the crossties were old worn out crossties. Weeds and grass had growed up over them, and just hid them. From those crossties to the rail that were in the track itself was not over two and a half feet. I walked along there three or three and a half feet from the rail. I did not know those crossties were there.

Before this injury it had been sometime since I had had occasion to walk along there. I suppose it had been four or five months, maybe six months. The time that I passed by there, the last time before this injury, the pass-way by the side of the track was perfectly clean. No ties over there at that time.

No. 75 train has from 35 to 38 cars. I had inspected 23 to 25 cars that were to go into 75 that night. There remained to be inspected and to complete the train something like about 12
83 or 14 cars. If I had not been hurt it would have been my duty to have inspected the balance of those cars. After I was

injured I did not go on and inspect the cars. I got hurt and was not able to get up to do any more work that night. I was not physically able. C. E. Smith and George Reynolds inspected the cars that went into 75 after that. I remained in the yard after I was hurt from the time I got hurt until about 7 o'clock the next morning. In the meantime train No. 75 was made up. They had finished it up. I seen it when it left. It carried more cars than I had previously inspected. They didn't shove back up the track. They went and shoved on to the lead, down that way from the engine, right on to the main lead, and as quick as they got through pulled right on out. They were delayed there too long to shove back. I suppose they were delayed something like an hour. When additional cars were put into the cars that I had already inspected, they got past the wrecked car by pulling back this way, because they couldn't pull them north. South is the way they pull them on track 26. They couldn't pull them out of the north end on account of the car being damaged. Ed. Jackson tried to push a car slowly by and it sideswiped it. Then he pushed out of 26 track.

Train 75 carries any freight to Anniston—made its first stop at Anniston for setting off cars. At the time of my injury I was thirty-six years old. My physical condition and health were good. I have never had anything, only a little grip, something like that sometime. I am crippled now. I was not crippled prior to the time that this injury occurred. It was my left foot that was caught. As I stand on my right foot and put my left foot down I can't get the heel to the ground. It is short, something is drawn up there so I can't get it down unless I get down this way (indicating). When I raise my right foot up then the other goes down. At the time I was injured, my back was straight and my shoulders straight—I stood straight—I don't stand straight now because I can't. I can't stand straight because my back and leg is hurt.

Before I went to work for the Southern Railroad as car inspector over there in the Inman Yard, I worked here in the shops. The first thing that I ever did for the Southern Railroad was putting wheels in under cars down there. That required heavy lifting. Prior to that time I had farmed. While farming I was engaged in plowing, hoeing, split rails, anything that comes to hand, ditching. I couldn't do half the heavy labor I did while I was engaged in those other pursuits because I can't stoop to do any lifting at all. I can't work as car inspector. I couldn't do the walking, stooping or lifting. The pain or suffering lasts all the while, never has quit hurting. It hurts right in this joint, and right back next to my backbone. Some nights I can sleep and some nights I can't sleep at all. Maybe three or four nights that I don't get any rest. When I got hurt somebody come and helped me where I was—I stepped back after I got hurt and laid on the grass about 5 feet away where they were getting O'Berry out, and somebody came and helped me up and got me down about 150 yards to the little office. I staid there until 7 o'clock the next morning. They wanted to carry me to the hospital and I wouldn't go, I wouldn't

agree to it. I told them I wanted to go home as quick as I cou
The next morning I got up and I starts and I would make sometin
ten feet and have to stop. Then I went maybe fifty yards and I g
hold of a pine that was probably five and a half feet long, somethi
like as large as my arm and I put the pine pole down and follow
it along. I got to my home on the street car. Dr. Cochran w
first called to attend me after I got hurt. He has been attending
me ever since. I noticed the limping in that other leg right aft
I got up. I staid in my room 57 days. Thirty-seven days I laid
bed. When I got up I noticed this shortening of my leg. Th
shortening has increased since that time. Dr. Nicholson examin
me; and Dr. Hancock and Dr. Jarnigan examined me, at the requ
of the railroad company. I am now working in a beer saloon f

J. M. Morris. I quit the railroad work because I was n
86 physically able to do the work. I can't stand and work co
stantly at the beer business if they put all the hours on n
at one time. They divided the time. I go on at 8:30 in the mor
ing and stay until 12:30 in the afternoon. In the afternoon I don
do anything. I am at home. From 12:30 to 6:30 in the afternoo
I stay at home and get rested and then come back and close up whe
we get ready. Sometimes close up at 9 o'clock, sometimes 10
10:30 and probably as late as 11 o'clock, but they hardly ever sta
open until 11 o'clock.

When I quit farming I was twenty-six years old. When I le
the farm I came to the Southern shops and got a job. I put whee
in cars, freight and passenger trains, and was paid at that work
dollar and ten cents a day. I staid there until they raised them
a dollar and thirty-five (1.35) staid there 11 months, and then
quit. I then went out there in the Inman Yards when they fir
started them and helped to build a trestle for old man Lane, a co
tractor. We were building a pine log trestle. We cut timbers, suc
work as was necessary and earned two dollars a day. I staid the
a couple of months. I quit and went back to the country and sta
a few days. Then I come back here and went to work at the Soutl
ern shops. I stayed at the Southern shops something over two yea
My pay was raised when I went back there to $1.85 for repairi
cars, ten hours a day. I staid down there until they sent me o

here to Inman Yards where I had been inspecting cars. Th
87 first sent me to the South Inman Yards and I staid over the
awhile known as an extra man, inspecting cars. They se
me from Howell, we say that is the South Inman over to the Nor
Inman and finally they put me regularly in the North Inman whe
I staid down there—staid down there about a year, and me and o
chief car inspector couldn't get along and I just quit and went to t
Georgia Railroad and staid there 11 months repairing cars and
the Georgia Railroad if my time was thirty days, I got as much
eighty or eighty-five dollars, if I worked on Sundays I got doub
time. After I left the Georgia road I went back to the Southe
under old man A. J. Gilleland and was there up to the time I w
injured. I think it was the 9th of April, 1907, that I went o
there.

COPY BOUND CL

When I was working as inspector if I made thirty days, I earned ninety dollars and 77 cents I think it was, and 31 days would be ninety-three dollars and some cents, I think that was the scale of wages. I worked as inspector from the 9th of April, three years. I think I went there in 1907 on April 9th, and they used me on the repair track a few days. I remained there from that time about three years until I was hurt—from the 9th of April to the 26th of August. During the time I was employed there I was off 14 days one time with the grippe, and one time, I think it was about three days, that C. E. Smith and I went to Jacksonville, Florida,
88 on a pass. I worked Sundays same as any other day. The car inspector's job is one that you are there all the time.

I was examined by Dr. Andrews for the railroad. He took X-ray pictures. Some X-ray pictures were taken at the Grady Hospital. I don't know the gentleman that taken them. Dr. Cochran was present. It was done under Dr. Cochran's supervision. He asked me to have them taken there for him. I am earning now twelve dollars a week. I am not able to work constantly, because I can't stand up on my feet long at a time. It hurts so bad that I give out on it. I never had any difficulty of that sort before I was injured. In 1911, the 26th of December I went into a saloon and tried to work. I staid there something like a month and I went back home and went to bed, give out, and I staid there two or three weeks. As quick as I got so I could I went back and tried it again, and I went on that way until sometime the first of May and I went home and laid in bed three weeks, I think it was. I couldn't stand it. My leg gave out on me, hurt me so bad. Dr. Cochran and Dr. Nicholson came out there and put a plaster cast on it some time late in June and it staid there thirty-three days. He told me to go to the country after he took it off and I went to the country and staid there until along about the 17th of December, 1912. In the meantime, I hadn't
89 earned any money at all, because I couldn't work, and I couldn't work because I was injured.

Next year, from August 1912 to August 1913 I come back to J. M. Morris's I think it was, about the 17th of December, 1912, and went to work for him for $9 a week and I worked there about three months and then he give me ten dollars a week for about three months, and ever since that time, ever since last May he has given me 12 dollars a week. If I lay off two or three days on account of my leg giving out on me, he don't take it out, just gives it to me. In the beer saloon I do nothing but draw beer. It is light work that I can do with my arms and shoulders. There is a counter behind and one in front of me where I can catch on either one of the counters and I make it backward and forward. I don't handle the kegs at all, got a nigger to do that. I don't have to do any heavy lifting.

I think Dr. Jarnigan only examined me one time. Him and Dr. Hancock and Dr. Cochran all examined me together down here at the hospital.

On August 26th, 1911, I was car inspector. Dr. O'Berry was working with Mr. Chappell's engine. The engine that O'Berry was

working with had run into some other cars over there in the North Inman Yards. Mr. O'Berry had been caught between the side sill and the end sill of the engine. The car reared up and the side sill caught him. When I first heard of it I was down in our
90 little old office, writing up my work. We had just finished the cars in 75, that is those that had been put in on the track. Had just finished those and had walked inside of the office for checking them off of my little book onto the big book that we had in the office, and we heard this crash and started over there and met Walt Lindsay. We were entering in the book the cars, the numbers, the engine numbers, the conductor, such as that. That was not the result of my inspection of train 75, not all of it, there were some others to be inspected. I had to finish it before I would put it all down in the book. Yes sir, this side of where I got hurt there is a bridge across the tracks,—runs east and west. The tracks in the North Inman yard run north and south. This shack that I was in was just below the bridge above the railroad tracks. The shack I was in was located north of that bridge about two hundred yards. That was my office and had been since I had been car inspector out there, for some two or three years. I had been located within two hundred yards of the north end of this bridge for two or three years. Both lead tracks are north of the steel bridge. The cars come off from those lead tracks on the different switch tracks. From the lead tracks go out 27 switch tracks which are to hold cars. They start at No. 1 and come back to 27. The engine and cars where O'Beary
91 got hurt was on track 25, maybe 26, I would not be positive. The man failed to throw the switch and let her run back in there. I don't know whether it was 25, 26, 23 or 24. He had 25, 26 and 27 all blocked when this happened. The collision occurred on track 25 I think. Tracks 25, 26 and 27 branch off from the lead. They ran parallel to each other, north and south.

When I heard that O'Beary was hurt I went over there to help him and when I got there, O'Beary was caught and Mr. Lindsay told me to go and get some jacks. Those jacks were for the purpose of jacking up this car under the engine to O'Beary could be pulled out from between there—then to place the car back on the trucks if it could be done, but there was no trucks there to place it back on, nothing to place it on—the trucks were too far back. The engine ran up into the freight car, just telescoped it, pushed it up off the trucks. This engine was under the car, O'Beary was caught on the side sill sitting on the end sill of this engine, when it struck the car with such force it crushed its sills up except the side sill and the engine run up and struck it, and telescoped it up on the flag staff.

He was caught between the engine and the side sill of the car. I went to get the jacks so I could jack the car up, hold it up so O'Beary could be pulled out from between the car and the engine—released from there. I went to get the jacks for him and then the car
92 to be placed on its trucks so it could be handled, could place it while we were holding it up there. I went to get the jacks to release him. He was fastened in there and I needed the jack so I could jack the car up and pull O'Beary up. In coming to O'Beary

I had to come to 25 track—a hundred yards from the repair track. The repair track is where they repair cars, light repairs. East of track 27, there is a sort of storage yard where there is stored different things and things that were used for repairing cars. Twenty-seven is not a repair track. The repair track was east of 27. I don't recollect where they did keep their storage yard. They had a box car somewhere over there where they kept bolts, nuts, such as they might need. They had a special place to pile blocks up that you have to hold those jacks up. We got this jack before we ever got to the pile of blocks. The distance between track 27 and the next track is at least thirty or forty yards. Up above the bridge the space between track 27 and the track east of it is where you get to the repair, the transfer comes in then. Ever since I have been there at work I have not seen between track 27 and track east of it, a lot of old trestle stuff. South of the bridge they used to keep some between the repair track and 27. Had old car box set off up there in which they kept bolts. Right adjacent to the car box, between the car box and track 27, I have never seen any timbers over there. I didn't notice any old timbers of the bridge piled up there if they
93 were there. I could not say whether they have been piled there ever since the bridge was torn down. I have worked there every night for two or three years but I didn't go along up by there.

From track 27 back the other way I would go, but the other way I did not. From 27 west I worked. I never worked from 27 east. I never inspected east of track 27. We had a fellow named Baker in day time who inspected east of track 27. There was an inspector of the cars on tracks east of 27 at night. Didn't have anybody then because no cars were loaded there at night. There were no cars inspected at night east of track 27 unless there was an accident, something like that. If we had an accident we had to go, no difference where it was.

This collision in which O'Berry was hurt was some 50 or 75 yards north of the bridge. They had a certain place up there for keeping everything. They piled all the blocks up in a place, and then they had the jacks up in a place, cleaned the yard up, when they quit every night. I come across those jacks before we got to the blocks and I told those boys to take the jack and that I will get the blocks.

I can't tell whether that photograph marked Exhibit "A" of the yard and tracks is a correct photograph.

When I left this engine and the car in that collision I had
94 to come back south across track 26 and along 27 to go and get those blocks. We kept up between the two lead tracks, up between 24 and 25, run up there even where we thought the blocks were and crawled up between the other cars, jumped between the cars on the coupling. I had to cross 27 after we passed the bridge. Then I got out where this space was between track 27 and the next track east of it—run right straight across the yard, right east. The distance between track 27 and the next track east of it at the point where I got those blocks is some thirty or forty yards. I didn't know that the space between those two tracks at that point on that side of the

bridge has been a storage yard for old timbers that came out of t
bridge. Never known of it being a storage yard at all. I have se
a few pieces of timber up there above the bridge. These blocks th
I got were something like 50 yards south of the bridge. There w
no timbers piled up on that side that I seen at all. I do not kn
that some are piled up there right now. They kept the blocks sou
of the bridge about fifty yards stacked on the ground between tra
27 and the next track on the east, right close to the repair tracks.
didn't know exactly where they were. I knew that they kept th
piled up somewhere. I did not know where the blocks were. I w
hunting for them. I couldn't say positively why I went th
95 for them. I happened to run right across them the fi
thing. I knew there were some blocks over there at so
place, I didn't know particularly where they were, but I knew th
they were about the repair track. I could not say that this pictu
marked "B" is a correct representation of the situation there as to t
space east of track 27 and between track 27 and the first track e
of it. I could not say that space has not only been used as a stora
yard there for years, but the grass has grown up in between the pi
of lumber there. I couldn't say what was in there at all. I nev
did see but very few pieces of timber there because it was low a
there used to stand a pond of water south and east of the trest
They had cleaned it all up four or five months before the accide
At that time I saw a few pieces of timber south of the bridge. Nev
had been a pile of timber in there. I never seen it. When I g
these blocks and put them on my back and started back to wh
O'Beary was, I was walking along the east side of track 27. I w
running as hard as I could. I had my lantern with me and while
was running along there I stepped on some clinkers. I stumbl
against those after I got nearly to O'Beary, just below the bridge.
mean by that north of the bridge. That is where I stumped my t
I was still on the east side of the track. I stumped my toe again
some clinkers. Some two or three, I suppose, were large on
96 That started me to stumbling and in shooting this foot und
the tie, jamming it up under there, it twisted and threw m
right face foremost. What I stumbled on was the clinkers, that w
what first started me. I never would have fell if I hadn't struck t
crossties. I first stumbled against the clinkers in four or five feet
where I struck the cross ties which threw me face foremost. I w
running as hard as I could run. I hit the clinkers and that ma
me stumble some. I was running as fast as I could and hit t
clinkers and that made me stumble and three or four feet from t
clinkers were the crossties. When I struck the crossties, that thr
me face foremost. When I am running as fast as I can, with a lo
like that, I could not go far in a leap. Something like three feet
about as far as I could step. I stumbled over the clinkers a
jumped three feet, then my foot hit the crosstie and then I stumb
and fell right face foremost. I hit the crossties. The end of it m
have been something like three and a half feet from the rail. I
not say whether the space between the end of the crossties and
rail was perfectly clean. The rail comes over here and the cross

project out a piece. Weeds and grass was all I seen until I hit this tie.

I do not know whether or not the cars which were attached to the engine that was pulling the cars when O'Berry was hurt were going into train 75.

97 Lee was with me. He went to get the jack. He was not with me when I stumbled. Neither of the others were with me, the other three men toted the jack and I toted the blocks. The other three men at the time I stumbled were ahead of me somewhere. I had two of those blocks. Lee and a couple of other fellows had the jack. The jack is made out of cast iron, some solid material. It was thirty-five ton jack. It weighed a couple of hundred pounds. Three men had it. They went directly in front of me. The three men got hold of this jack. There was a handle on each side and two of them caught hold of the handle and one man at the end over there, and went down the tracks. When I fell down my lantern went out. When it dropped it put the light out. I pulled myself up by the side of the box car. I caught, I don't know how, but pulled up by the box car and I felt around there and got my lantern and struck a match and I shined the light around there. I did not call anybody. O'Beary was hollering and begging us to get him out and I just reached around and got the smaller block and followed it down there, and they put the jack on it. After I lit my lantern I got the block up to where O'Beary was hurt, the length of the engine and about half length of the box car, about forty-five feet to where O'Beary was injured. Then I just stepped out about ten feet and laid down on the grass and stayed there a couple of hours. This

98 grass that I am talking about was west of where the accident happened, over next to the other lead, about 10 or 11 feet. Then I went back to the shack when somebody come and helped me up. I spent the night at the shack, until 7 o'clock the next morning. Then I went to the street car and went home. From the shack where I spent the night to the street car was four or five hundred yards.

From the end of the old ties to the end of the ties under the rail was not a space of over two feet. You put the blocks down for a foundation for your jack, then you set your jack on top of it and jack the car up.

These cars that were attached to the engine where O'Beary was being gotten out, blocked the track they were on. This car caught fire when the collision occurred. It bursted the headlight and that throwed the oil up there and it caught fire.

I staid there until Mr. O'Beary got released. I laid down there and watched them get him out. As to whether they were trying to put the car on the track with the jack and block, they couldn't do anything with it because it was in such a shape that all they could do was to let it down back on the trucks that were knocked away back under it. As to whether all they had to do was to jack the car up, get O'Beary out and then let it settle down on the tracks—if it hadn't been torn up so bad we could have pushed the trucks

99 back so as to handle it. It broke the sills so they couldn't do that and had to let it go like it was. It was prized up for the

purpose of releasing O'Beary—to get O'Beary out. If we had push
forward with O'Beary on the engine where he was jammed in w
the other car, or pulled the car from the engine, it would have kil
him. If the engine had backed back in the other direction from t
car it would have killed him. So it was absolutely necessary
jack up this car to release O'Beary. After O'Beary was releas
the car was allowed to settle back on the trucks—had to becau
there was no other place to put the trucks. I didn't see an engi
go down to the other end of this cut where O'Beary's engine was a
hitch to it. It come in at the south end and I was at the nor
end of the bunch of cars. I couldn't see the engine up there bu
could see the cut of cars as they were pulled out from down the
As quick as they got O'Beary out, they backed the engine out a
then let the car down. That was all that we could do, because
couldn't get the truck back. We had to get O'Beary out before t
wreckage could be removed at all. I did all I could to save O'Bear
life. The first thing on my mind was to try to get O'Beary out,
that was necessary to remove the wreckage. In case of a wreck or c
lision by which the tracks are obstructed, or the life of an employe
imperiled, all the employees that learn about it try to do t
100 best we can to clean it up and to remove everything at a
time. That applies to all the employees. If I didn't do th
and the officials found it out they would run me off. They got t
fire put out on that occasion. As soon as we got to O'Beary we ke
two men toting water out of the tender and one up in the car dashi
the water over it until we could get him out. We dashed water on
before we had stopped and let it down—kept dashing water on it un
we got him out. A. J. Gilleland, Chief Car Inspector had given
instructions to help in clearing the track, in the yard there at t
Southern road. They were in writing and oral. Every few days
bulletin would come out there and say go to all such accidents a
everything of that kind and assist the best way we could. T
bulletin that I am talking about it not this particular one at a
there are several. I have read this one many a time. That c
don't cover all of it at all. That is one of the bulletins. It
not the one I have reference to at all. I cannot tell how ma
bulletins I ever received. I received them every few days fr
the time I went there until the time I got hurt. I received i
structions every few days. Every time the Chief Car Inspect
came down there and heard that anything had happened up in t
yard, he would say—Now look here boys, you look after that busine
Then there would be a bulletin about it. He would say th
101 people are supposed to tell you and you go and look after a
kind of an accident. If you hear of anything of the kind
want you boys to look after it. Where any accident happened, a p
sonal injury, anything of that kind, if we heard about, we were
go right to it. I had written instructions and oral instructions
assist the injured and help to remove the wreck. Mr. Gilleland
not there that night.

H. E. PUCKETT, plaintiff, recalled, testified:

I worked for the Railroad Company as car inspector the last ime about three years, from the 9th of April until the 26th of ugust. Six other car inspectors were on duty there with me at ight. Neither I nor any of the other car inspectors with my nowledge, during the time I was employed there as car inspector ver took out or put in any cross ties out of the track. I had nothing o do with the maintenance of way. The tracks there were repaired uring the time I was there, under Mr. Smith's direction. He was rack Supervisor. He had a gang of men there in the north Inman ard and in the south Inman Yard for the purpose of maintaining he track and keeping it in order. Those men who worked there in he yard taken out all worn out ties, made the track perfectly safe ut in switches and frogs. As to the old ties, he was supposed to have taken them out and burned them. I have seen them do it. I 02 have seen the men around there taking them out and burning them. I have never seen an inspector of the cars engaged in hat business at all during the whole time I was there.

I weigh about 151. At the time I was hurt I weighed from 180 o 187. I weighed when I entered the company's service the last ime on April 24th, 1908, about 179.

That is my application. That is my signature. I never answered hese questions—Age 32, weight 165. I didn't answer that part at ll. I never signed that. All I signed was right here, (Indicating). He never asked me that question at all. Mr. Manley went and got hat and fixed it up himself. He didn't ask me as to my weight and never answered 165 pounds. This was filled in before I signed it. signed the questions down there myself. That is not my handwrit- ng (Indicating). I didn't have anything to do with that other part ver here. I don't remember whether I gave my height as five feet, en inches. That is my height. I guess I gave my age as thirty-two. can't say positively. That was my correct age. I didn't tell them hat I weighed 165.

Plaintiff introduced in evidence sciograph of H. E. Puckett's elvis, which is attached, marked plaintiff's Exhibit No. 1.

03 J. L. CHAPPELLE, sworn for defendant, testified:

I am working now for the Southern Railway Company as ard foreman of the switchmen. A yard foreman has charge of ard crews engaged in switching. It is the same thing as the freight onductor except you are in charge of switch engines. I was at ork on August 26th, 1911, the night Mr. O'Berry was hurt. The umber of the engine I was at work with was 1714. In that yard here are the lead tracks, one runs out from the lower end of the ard, the Inman yard, there are tracks numbered up to 20, that run ut from it, and there are also tracks that run up to the hump, the ump tracks run up a hill in the yard and the tracks run off from e hump, and there are what are known as house tracks. Switch acks from 21 to 27 inclusive are connected with the lead. 21 is est of 27. The tracks out there facing south, run from 21 to 27. ll the tracks out there run north and south. There is about 12 or

14 feet between 27 and 26 and between 25 and 26, five or six f
or probably eight feet, something like that. They are paired
between platforms. Built a platform between 27 and 26 and th
is one between 25 and 24 and there is a platform between 23 and
and one between 21 and 20. The platforms are used for tra
ferring freight in loading and unloading cars. Track 28 is e
of track 27. Photograph marked "A" is a correct pict
104 of the situation out there, generally, as it existed at the ti
Mr. O'Berry was hurt, we will say August 26th, 1911. T
tracks were all the same. Between tracks 27 and 28 around t
bridge, north and south of the bridge, there are old drawhea
timber and such stuff. It is used for putting old timber there. A
south of it there is a car inspector's shanty with tools and all kin
of materials, drawheads, knuckles, bolts and everything like th
that is used in repairing a car. Between track 27 and 28 south
the bridge the distance is about forty or fifty feet as well as I c
guess at it, I don't know the exact distance. North of the bridge, t
distance between those two tracks would be about sixty or seven
feet. The tracks flare out after leaving the platform. I had be
at work in the yard prior to August 26th, 1911, in this locali
around this bridge, as a switchman, since November 1910. I start
to working on the house November 13th, 1910, as a switchma
The condition of the yards between tracks and between rails—
tween 27 and 26 out there, was in fairly good shape. Between
and 28 it was piled up with timbers, such stuff as that. That
what I said was used for storage. On the night that Mr. O'Bea
got caught between my engine and some other cars, he was caug
on track 26. That was north of the bridge about a hundred, a hu
dred and twenty-five or a hundred and thirty feet. That is a gue
I don't know the distance, but it is something like th
105 My crew had been engaged prior to that collision in swit
ing all cars that were marked to come out of the house trac
Those cars go everywhere—go into trains and anything else that
there from up from six o'clock in the evening until about ten.
My crew that night had done no work at all on train 75, or
switched cars out for the train took them out of the house. We h
switched cars to track 23. At the time of the collision in which
O'Berry was hurt, we had finished our work on those cars about
or fifteen minutes before the collision occurred. The cars I h
attached to my engine at the time of this collision were South
13774; Southern 34960. Southern 13774 was empty and 349
was loaded. These are the only cars I had attached to my eng
at the time. I was shoving them in on track 26 to pick up a
to kick in on track 21. None of those cars, neither the two tha
was shoving in there nor the one that I was going to pick up
kick were to go into train 75. My engine was moving south at
time of the collision. It was headed south. Those two cars attac
to the engine were in front of it. We were pushing them. A
car was directly in front of the engine. The cars that we w
shoving ahead with our engine collided with other cars on track
When they collided with these cars on track 26, O'Berry was

the front foot board of engine 1714. That was a switch
106 engine. It had no cow-catcher on it—just a footboard. A couple of boards about three feet long and about a foot wide on each side of the front of the engine for the boys to stand on. O'Berry was riding on the engine on the right side at the front of the engine on the footboard. When the collision occurred the engine run partly into the car immediately in front of it and the sill on the side and the end of the car was up around the boiler—sort of telescoped the car, went into it. The head of the boiler was right about the end of the car. The car in front of the engine was lifted up off its trucks. The trucks were knocked back mighty nigh the middle of the car. Mr. O'Berry was pinned in between the car and the sill. He was between the two. I was there when an order was given for anybody to go after jacks. When it first happened I hollered for somebody to go after jacks, to the caboose of 75 and I heard other hands holler also. I don't remember that I gave Mr. Puckett any orders to get any jack. I merely hollered, "Get some jacks." That was before anybody got there except those right there at the time. I wanted the jacks to jack up the car so we could get O'Berry out from under it. I guess I was there at the time Mr. Puckett got hurt. I didn't see him get hurt. I didn't know anything about it until the next morning, I think it was. I left the
collision after we got Mr. O'Berry away from there, went to
107 the shop and got another engine, I don't remember how long it was. I was there when the car was pulled off the engine. They just come in at the upper end of track 26, another engine come down there, and picked up the two cars and pulled them off the engine. I don't know what the condition of the track was at the time this photograph "A" was taken. I don't know who took this. I never saw anybody at work out there between the tracks, lining them up, fixing the crossties. I work at night. I never saw men working on the track under a foreman. I don't remember who was the track foreman on that section embracing this yard. I didn't see the section foreman; his work was during the day and I was at work at night. The track supervisor was Smith, I believe. His given name was Sam—I am not sure that is it. I don't know who the track foreman was. During the entire time I was at work in this yard I never saw men repairing the track at night, never had occasion, as I was up on the house at night. I have seen them down in the North Inman tracks, taken up by the section men. The yard is not cleaned up by the section foremen, they repair the tracks, take out the crossties, things like that and carry the crossties off which they take out—remove those. This track 27 was on the outside of the track next to that open space that I mentioned as being about forty or fifty feet wide. Outside of that track was used
at that time for the storage and piling of old material. Old
108 ties, old scraps, anything of that sort, and it was used for the piling of stuff on the outside, between there and number 28. Mr. O'Berry was alive when I went to jack up the car. He didn't die at all. I could not have possibly have moved this car with O'Berry as we was there, without killing him; I don't suppose

we could, we didn't try it. Therefore, the first thing I had on my mind was to get O'Berry out. Not to move the car but to jack the car up. When I was first asked the question I said to get O'Berry out. We had to get him out before we could move the car. We didn't jack it up for the car to be moved, but to get O'Berry out. We had to jack the car up to get O'Berry out, had to do that so the engine could be moved from under the car. In jacking the car up we had to move the car but we had jacked the car up so we could get O'Berry out. The jacking up had nothing to do with the moving of it. Couldn't use it until you put the pair of trucks under it. We didn't lower the car on to the trucks and then move the car. The trucks were left where they were knocked under the car. We jacked it up only to get O'Berry out.

I can't say how many cars I had handled in working with train 75 that night, about 12 or 14, something like that. I did not handle any cars after this accident, going into 75 that night. I could not tell how many cars went into 75 after the accident.

109 I didn't place them in the train. The cars that I switched into train 75 had been switched in before this accident occurred. I didn't switch any more to go into train 75. They were all switched before the accident occurred, all that I had switched in—all that I had anything to do with. Whether any more was switched into 75 I don't know anything about that. I had switched all the cars out of the house for that train, before the accident. I am not prepared to say that the only cars that went into 75 were my cars that I had switched in there that night. I don't know anything about 75 at all except I switched cars in there before the accident. The two cars that were involved in this wreck, the one the engine bursted into, one of them was empty and the other was loaded. I don't know anything about two other cars. Two cars that hit in the collision I had hold of, I went in there to pick up one. I don't know where that car was going. It was simply a car on that switch in the yard. It had a destination but that car had been dropped in there to go to the shop or some other place. I don't know whether it was loaded or empty. We send loaded cars to the shop. We went in on track 26, it was filled with cars—I went in there to pick up one. Train 87 ran from Atlanta to Chattanooga. I did not put any cars with my engine in 87 that night. I switched other cars to destination besides train 75. I switched cars to any destination on the tracks at the house, different destination.

110 I could not say that I had any car going to Chattanooga that night, unless I looked at the house list. I could tell by looking at the house list. I don't know where the house list is. I have seen it. It is a loose slip, cardboard system. (Handing witness some paper.) It is a list like that. The clerk at the transfer got it up. I don't know who was the clerk at that time. That is the original list I switch by. As to those two cars that were involved in that wreck, one of them was empty, a flat car, brought in the yard and dropped on the empty track. The loaded one, I forget now where it went to. It had merchandise in it. The list would not show what the car was loaded with. The number of that loaded car

was Southern 34960. I had no means of knowing the destination of that car—it was just a set-back car. Now, the list shows Eastman, but the list seems to be changed. I only know from this list. That is car 34960 in one hand writing and the balance of the memorandum is the change that I speak of. It looks to me like about the same handwriting as the balance of the list. It looked like it had been written over, I don't know that it had been changed. I don't know whether it was changed or not. I don't know who did that writing. I think probably the same clerk that did the other. If there has been a change in it I don't know who made it, nor when, nor for what purpose.

111 I only had two cars ahead of my engine. When I got against the other cars on the track, they were ahead of mine. I could not tell you where those other cars were going. I don't know. I intended to shove this engine and the two cars in on that track where O'Berry was hurt, to pick up one on that track so I could come out on the lead track. On the occasion of the collision, which occurred by a misunderstanding of the signal. I went in there with two cars and the engine and was going to pick up a car on twenty-six and kick it in on track 21 so as to clear the lead. I don't remember where the one that I intended to kick up was destined to. I don't know whether 87 went out that night. It goes out every night I think except Saturday night. I think, as well as I remember, that it was Saturday night that this occurred. 87 didn't go out. If any train went out to Chattanooga that night, it was probably eighty-five.

This is a memorandum that was furnished me by which to switch cars (looking at list). A memorandum furnished the switching in reference to switching, it refers to cars that are tagged, supposed to be tagged. Car tag 135,727, A. W. & P. seems to have some change made on it. B. & O. No. — and A. B. & A. 183158 appear to have been changed too. After a list is originally made up, for the handling of cars, those cars are changed from where they were originally intended to go to somewhere else. I suppose so, as there are

12 changes in the list, from one road to the other. The bill of lading for this Southern 34960 will show where it was going. I put in on track 23 twelve or fourteen cars destined to go in to 75. 75 leaving there would have about 35 or 38 cars. You can find the destination on the bill of lading. I suppose there is a bill of lading for a shipment, where a car is loaded, wherever it is. An empty car would have no bill of lading.

G. W. LINDSAY, sworn, for defendant, testified:

I am in the employ of the Southern Railway Company now and was in its employ August 26th, 1911, the time that O'Berry was hurt in the yard. I was conductor of switch-engine. In the North Inman yards there are a large number of switch tracks that connect with a lead. Cars are placed on those different tracks, as you may want them for different points in the yard, and we make up our trains out there and do different things like that. I am familiar with the condition of the yard out at that point and was at the time

O'Berry was hurt. The North Inman Yard, with reference to the special portion immediately north of and immediately south of the bridge—the Old Sweat road bridge, as to cleanliness was in fairly good shape. I was in the yard at the time of this collision in which
Mr. O'Berry was injured. I was sitting on the end sill of
113 my engine somewhere, may be ten or twelve cars on the same
track the engine was when we had the collision. After the collision, I stepped out from the footboard of the engine, gave the engineer a signal and made the remark—Come let us go up where that trouble is, as I heard it. I gave my engineer a signal to come ahead, so we could go up there. I went right up to it. I only seen one man when I got there that was working out of the crew of the fireman and the engineer of the engine that had the collision—and Mr. Lee, a switchman, he had done gone up and got some blocks—he was up there at the time I got there, and the engineer and the fireman. I can't say that I remember the very instant that Mr. Puckett came up there. Everybody, the yard men come over that way. I didn't notice any certain person, couldn't say as to any certain person coming up there at any certain time. I don't remember that I gave any orders to Mr. Puckett to get any jacks. I might have said,—Boys, go and get some jacks, something like that. I don't think I addressed any certain person personally. The purpose of getting those jacks was to raise the car. I wanted to raise the car to get Mr. O'Berry out from under the car. The rip track is in a kind of south direction from where the accident happened, east of track 27. Same people call it the repair track, some the shop track, some the
rip track, whatever you want to call it. It is a track where we
114 carry crippled cars. That is a track that is immediately east
of track 27. I rode right down on the front of my engine to the place of collision. After Mr. O'Berry was released, I took him to the hospital with my engine. As soon as I got up there with my engine I made arrangements to take him to the hospital with my engine. I had to back my engine back up north. I sent it back up. I gave orders to my switchman to take the engine around and take a caboose—run the engine up by the side next to where the accident was, with the cab. So when we got him out there wouldn't be any delay in getting him to town. I just brought him to town with my engine and the cab and I come with it. I couldn't say the exact time I got back to North Inman Yards—something like 11:30 or 11:50, somewhere along there, I couldn't say the exact minute.

At the time of the collision, Mr. Chappel had finished his work with reference to train 75 according to our rule that we were working by. He had a red signal in front of the car. He never put the signal there until he got his stuff ready. He put that signal there 15 minutes before the accident occurred. I was going to work there I was going after the balance of the stuff for train 75 when I stopped to take O'Berry to the hospital. When the collision occurred I was
stopped, as I had begun to clear track 23 and it was blocked on
115 account of the accident. I didn't get back on 23. I just took
my engine immediately to carry O'Berry to the hospital.

At the time the balance of the train was made up—when I pulled

out on the transfer when I came back, they were making the movement down at the North Inman block office—got the stuff out of the south end of the transfer and taken it out — North Inman. Another switch engine was making the movement down on that track there after I come from the hospital. I couldn't say whether anything was left there after those cars had been pulled by the engine out of track 26, because I didn't work it and I don't know what time the track was cleared. I suppose my memory is very clear as to what happened when I first came up there where the wreck occurred that night. I remember as well as any ordinary man would do in regard to it. I remember that Mr. Puckett was up there; I don't remember paying any particular attention, nor would you if you had come up there that night. I wasn't paying any attention to Mr. Puckett there at all. My business was about something else, and my mind was not on Mr. Puckett at that time. So Mr. Puckett's presence there made no particular impression on my mind.

116 I. H. McElroy, sworn for defendant, testified:

I am in the railroad business working for the Southern Railway as yard conductor. I was at work in North Inman the night of August 26th, 1911, when O'Berry was hurt, working then as night yard master. I was there that night. There are two lead tracks in that yard at that point in North Inman. Twenty-seven tracks run out from those lead tracks at that end of the yard, on the two leads. That yard at that time was clean, kept clean all the while. There had been no special reason there for its having been cleaned up shortly prior to this that I know of. Track 27 from track 28 above the bridge was fifty or sixty feet I suppose, along the bridge, may have been further. They converged as they went under the bridge and got a little wider apart as they went north. That space between those tracks was used for nothing particularly, just a vacant place in there. I do not know that anything was stored in there. The rip tracks were from 28 over to 31, I believe—28, 29, 30 and 31—four rip tracks. They were used for repairing cars. The bolts, nuts and things kept in relation to track- 27 and 28 for the purpose of repairing cars were kept in a rack on the side of 28 there where they keep all the material and stuff. That is between 27 and 28.

This night at the time the collision in which Mr. O'Berry was injured occurred, I was at the extreme end of the South
117 Inman yard at the time he was hurt. I heard of it and came on up there. When I got there Mr. O'Berry had been released, they had taken him away. Mr. Lindsay was not there then. He had taken Mr. O'Berry to the hospital. I finished making up train 75 that night. I handled it myself. As to the movement I made—I just went back up the other — of the yard and got my engine and took the cars out and worked on the transfer of South Inman down on the yard main line and let train 75 pick them up off of the main line.

I started my work south of where the collision occurred. Brought the cars to the south end, shoved them down on the yard main line of South Inman and 75 picked them up right off of the yard main

SE IN CENTER

line. I completed train 75 about 12 o'clock if I remember right. I did not see Mr. Puckett that night. I got these cars down south and proceeded down that way until I got them on the main line and the train 75 come up and they were delivered there. I did not come to the scene right where the collision occurred. I went around on another track.

I don't know who inspected the cars that I saw put in 75. There were three other inspectors in North Inman, I don't know what their names were. I don't know who was the man inspecting the cars going into 75 that night. I don't know who handled them. Puckett was a car inspector under me, of the North Inman Yard. I
118 have been in the railroad business about eight years. Before I went into the railroad business I was farming. I worked on a farm until I was 17 years old. I had to fight grass a good deal. As to how long it would take grass to grow over a few crossties and cover them up, it is according to the weather. In rainy weather raining all the time, it would take but a few days. I should say five or six days. The size of ordinary cross ties is about six inches thick and about eight inches across the face, across the top. It would take a month for grass growing up enough to cover crossties. Or, it might be more depending on how rich the land was and the state of the season.

I don't know who was the track foreman who had charge of the work in that yard. I was working at night. I never seen the track foreman. It was no part of the duty of the yard master to take the crossties off the track. It was not a part of the duty of the yard master to dispose of the ties—that was the duty of the track foreman to do that.

Mr. Smith was the road supervisor at that time, I think. Mr. Biddy was road master at that time. I don't remember who was the track foreman who had the job of looking after that work in the yard. I have seen the track foreman repairing the yard from time to time, the tracks in it. If this wreck hadn't occurred, the
119 most convenient way of moving the last cut of cars, the cars that would go into 75, would have been right out on the track where the wreck happened. The happening of the wreck made it necessary to detour the cars around over another track, bringing them out another way. That is the way the train was made up. The leaving time of 75 was 11:35. It left somewhere about 12 o'clock I don't recall exactly. My recollection is that it left about a half hour late. That was due to this trouble in the yard.

A clinker is cinders where you clean out one of the engine's fire box—burnt coal. All the engines in Atlanta burn coal—all that I know anything about. They don't burn any oil here.

W. E. JACKSON, sworn for the defendant testified:

I am not working for the Southern Railroad now. I am farming. I was working for the Southern Railroad in August 1911 at the time that Mr. O'Berry got hurt. I was yard foreman of a switch engine. I had nothing to do with making up train 75 that night. The cars

ision occurred on track 26. At the time the collision occurred, I had a cut of cars on the hump, coming with a cut over the hump. The hump is south of the bridge. I didn't go down to the scene of the collision until I went down there to remove the damaged car. The yard master ordered me down there. I went down there to remove the damaged car from the engine. I saw the engine
120 and the car where they were together. To relieving the situation, I coupled to the car, pulled it off the engine, pulled it up to the south end of the transfer and put it on track 31. I had a derailment and worked there until I was relieved. Day come and they relieved me there. I had a derailment two hundred yards from where I first got hold of the car. I had pulled it off the engine and was carrying it down the track. The engine had telescoped up under the car. I come from the south end of the transfer—south of the point of collision. There was only one car on that track when I went down there after that car. The rest of them had been taken out before I got there. I hitched to that car and moved it off of the engine—got it out from there. It rolled before it derailed about twenty car lengths—I don't know just the distance, must have been somewhere between 200 yards, probably. I don't know whether train 75 had left on its trip that night or not, at the time I pulled the engine and car apart.

(Showing witness a picture "A".) I recognize the location of that bridge there with reference to the tracks. From the top of the rail to the end of the crossties, I judge it to be two feet, maybe a little better. Those crossties are all uniform length and the track is a uniform standard guage track. All of the yard track, the main tracks, the switch track, are all standard guage and they have
121 about the same size crossties—crossties are nearly the same size. They vary in thickness but all of the same length. I don't know anything about the accident at all. I only taken the car off the engine. The engine was removed by some one, but I don't know who. I don't know who did that. They turn large clinkers out of those engines in the clinker pit. The clinker pit is near the round house. The place I call the clinker pit is where they specially go and take the clinkers out of the engines. The size that usually comes out of them varies from that spittoon down there to a marble. I have been engaged in farming only a month. I never farmed before then. I have not had any grass in my crop yet.

This clinker pit from where this collision occurred was not over a hundred yards, hardly so far. The clinker pit is situated southeast from where the accident happened. The rip tracks are between track 3 and the clinker pit. The clinker pit is on a track on the outside of the rip track right next to the coal chute. That is where the clinkers are taken out, where the place is specially fixed for cleaning the fires.

I didn't have anything to do with jacking up this car—I don't remember seeing any jacks. The jacks were not still under the car or I could not have handled the car.

122 This clinker pit that I am talking about was put underneath between the two rails and the engines would go up there

and clean their fires. They were put there by the railroad compan for the purpose of taking your engines there and cleaning them ou I never heard of a yard without ballast in it, or cinders. There is n difference between cinders and clinkers.

The cinders and the clinkers are crushed up into small pieces, of marble size—that's what I call cinders. I never put a clinker as bi as a spittoon between the tracks where I am fixing it up—never see any in there that large. The trucks of this crippled car, when went down there to couple up the car, was somewhere near the cente of the car. These clinkers that are taken out of the fires, are th clinkers that are mashed up to be used for ballast. They put the on loaded coal cars and use them where they are needed.

H. E. COCHRAN, sworn for the defendant testified:

I live in Atlanta. I am working for the Atlanta & West Poi Railroad. I was working for the Southern Railroad August 191 when O'Berry was hurt as conductor. My run was from Atlanta Birmingham. That is the train sheet of my train of date Augu 26th (Handing paper to witness). My train was due to lea
123 Atlanta for Birmingham at 11:30 at night. I was in t yard at the time O'Berry was hurt. I was checking up tra
75. All of train 75 had not been made up at that time. Only a p tion of it had been made up. After that collision my train w standing on track nine or ten, I can't say which track. There we about eighteen tracks west of 27 out there in that direction. T balance of the cars which I took to Birmingham were put into m train that night by the yard master who pulled them from the sou end, brought them around down on the main line and I caught the in the North Inman. I coupled to them there as I departed f Birmingham.

I went to the scene of the collision. I saw Mr. Puckett that nig I was there when the car was gotten up off of Mr. O'Berry. H was placed in a box car, as well as I remember, and I gave him cushion out of my caboose. I know the gentleman that was the fo man of the engine but I couldn't call his name. It was Mr. Linds After O'Berry was relieved, I finished checking up my train, pul down North Inman and got the remainder of my train. I did stay there until the engine and car were separated and the wr cleaned up. I don't know how it was cleaned up. My leaving ti was 11:30, schedule leaving time. I left that night somewhere abo midnight, I could not be positive, I was a little late. I didn't kn that Mr. Puckett was hurt when I left.

124 The headlight was on fire and burning the car. A lo people were toting water to put the fire out. We finally tinguished it in that way. Some of them were jacking up the c some helping O'Berry, some carrying water to put the car out; engaged in some such work as that, trying to release the man—try to relieve the situation.

What we were trying to do was to release O'Berry—trying to s him. We were trying to put the fire out—trying to save the car fr

burning him up. The human being was the first consideration, but the car being on fire we were interested in putting that out too.

J. P. McDONALD, sworn for the defendant testified:

I am working for the Southern Railroad now. I was working for it in August 1911, when O'Berry got hurt. I was at work that night. At the time the collision occurred I was over on track 17, North Inman Yard. That was 9 tracks from the track where the collision occurred—track 26. When I first knew of it we went over there to assist in getting the gentleman out from under the car. There were several men around there. I never paid very much attention as to who all I did see, but there were several employees around there, all trying to aid the men in trying to get the man out from
125 under the car. I stayed there until he was gotten out. I helped to take him out myself. The car was jacked up. I don't know who brought those jacks up there. After Mr. O'Berry was released, I returned to my work. I had been working in this yard for quite a while. I had been there for about three years or a little over now.

The general condition of this yard relative to being clean was fairly good shape, I would consider it. The clinker pit was away across over on the other side of the railroad tracks by the coal chute—east of the rip track. The clinker pit is used for cleaning the engine out. The rip track was east of 27, farther on. Six rip tracks were there—three tracks are what are used for rip track purposes. The rip tracks are used for repairing cars. It is some distance between track 27 and 28, at the bridge, but I am not able to tell the exact distance, some little distance in there, though. They use that space between tracks 27 and 28 for storage, putting anything in there, junk, that they wanted to put in there. I have seen crossties, pieces of box cars, anything they wanted to put in there. When you check up trains over there on track 27 you use the right hand side, the tagged side. It is the west side of track 27. There was a path along track 27 on the east side with enough space there for the men to walk along—they use the space on the east side of the track. If you wanted
126 to walk there, you could use it for all such purposes. Beyond that path there was a depression that is used for storage purposes. The space east of track 27 is plenty wide for a person to walk along there up and down the track. Tracks 27 and 28 converge as they go under the bridge.

I don't know anything about Mr. Puckett being hurt that night. I didn't see him any more at all. I just worked there at night at that time. Mr. Puckett was, I suppose, in the crowd, I never specially noticed him. He might have been standing in the crowd when I went up there. I did not see him personally, that is, I don't remember seeing him.

On the east side of 27 there was a pathway plenty wide for a man to walk. Just to walk, wide enough for a man to go up and down the yard there. I never measured the space between the crossties and the path. I could not say that it come up to the end of the

crossties. I could not say how wide this particular path was. I was a foot-path, just like an ordinary foot-path, for we men to walk along there back and forward—men checking from that side. A man checking from that side would naturally be as close to the car as he could get. Sometimes he is and when he has plenty of room he walks as wide as he pleases. In that space between tracks 27 and
28 I have seen different parts of materials, I have seen flat
127 cars, broken parts, box cars, drawheads, and car wheels stored.
I never took no notice as to the distance they were away from track 27. That night I was making up train from the lead—eight train. That train frequently runs to Greenville and then again only to Toccoa. I was engaged in making up the train 80 when I left to go to where this accident occurred. I stayed at the place of the accident just long enough to get the man out from under the car. A very short time. I never paid any special notice to the time—twenty-five or thirty minutes, something like that. In the meantime, nobody was doing my work, making up my train. All of my men were over there trying to help the boy out of the trouble. I did nothing else except to try to help the boy out—tried to get him out. The car was put out before I got there. It had been on fire. After I got there it was a short time before we got the young man out. I don't know that the first thing they did was to put the fire out. It was not burning when I got there. They had put it out before I got there. They took O'Berry out after I got there. Certainly they took and put out the fire before they taken him out. They out the fire out to keep from burning O'Berry up, certainly, is reasonable enough. If they could not have put out the fire, it would have burnt up the box car. It wouldn't the tender because it was of iron. The engine might be injured by being exposed
128 to the rays of the hear. I wouldn't say that it would hurt the engine. The two cars could burn.

J. N. Biddy, sworn for the defendant testified:

I am working for the Southern Railway now as track supervisor. I was working for it in August 1911. I was roadmaster at that time. I became track supervisor December 6th, 1912. As roadmaster my territory extended from Ooltewah Junction to Brunswick, passing through Atlanta. Atlanta was in my territory. I know the situation in 1911 of the North Inman Yards. I went over the yard track there. I have charge of the section men who remove cross ties from under the tracks in the North Inman yards. I did not personally have anything to do with it except to direct the section men—the section foreman and other men who were to do it.

In August 1911, and shortly prior to that time we removed some ties out of the North Inman yard. In August 1911, or sometime prior to that, I did not personally leave any crossties near the east side of track 27. I did not have my information relative to two cross ties being left in the North Inman yards at a distance from 90 to a hundred or 150 feet north of the Sweat Road Bridge, within two or three feet of the east rail of track 27. At that time, it was a pa

COPY BOUND CLOS

of my duty and prior to that time, to have a general supervision of the yards in connection with my other work. In connection with that duty, the North Inman yard was inspected. I inspected that yard about once every thirty days. During the length of time I inspected the North Inman yard prior to August 1911, I did not see any cross ties near track 27, on the east side, in the North Inman yards.

I examined the track every thirty days. That was my custom. I have no distinct recollection of examining that particular track any time within thirty days of this particular time. It was part of my work to give it a general supervision. I have no record of the last time I was over there between track 27 and 28 before the 26th day of August 1911. I have no recollection as to when I was there. The track foreman had charge of the men, the section men, he had charge of that part, covered by his section. The particular track foreman who had charge of the section that included that particular track, at that time, was R. L. Cowen. R. L. Cowen is the man under whom the section laborers work, immediately under his eye. He reported to the track supervisor. Sam Smith was the track supervisor at that time. I was the man to whom the supervisor reported. I reported to the Superintendent and then he on up to another, until it gets to the president of the road. It was Cowen's duty, whenever he found a defective tie in the track to *to* put in a new one when it became so defective that it was necessary to do so. He was the judge of that. His general duties were to keep the track lined up, keep it in order, see that the ties were kept sound. It was his duty, when he took out old ties to dispose of them according to the rules of the company.

C. F. McDANIEL, Sworn for the defendant testified:

I am a photographer and was a photographer in August 1911. I took that picture "A" about the last of December 1911. That is a picture down there in the Inman Yard of the railroad under the bridge, looking back toward the city. That is a correct photograph. Picture "B" is the same thing taken in an opposite direction. That is a correct photograph. Photograph "C" was made last Saturday—day before yesterday. That is a picture south of the bridge. Photograph "D" is the other side of the bridge north.

I took these pic*ut*res, "A" and "B" December 1911. This picture "D" was taken Saturday. This tower to the left is away from town. That is the north side. That puts the tower on the right hand side going north. That is the track runs through here and back of the tower over there you see the other track. That's on the right hand side going north. These tracks back there just under the bridge do not come close together. They do down there at that house. From that house to the bridge is several hundred yards. From where I was standing, these tracks on my right are about a hundred feet. Those tracks spread a little as you go on. My photographs don't pretend to show the relation of these tracks to each other. Mr. Anderson placed me there to take the picture. He is the claim agent of the company. My photograph shows the picture, standing a little to the right of the track and taken south.

SE IN CENTER

The tracks are running parallel and they converge together as they come to the bridge. I don't know anything about the condition of these tracks at the time of the accident. As a matter of fact, in photographing at a long distance object, the camera can*not* be made to make things look very peculiar. It depends on the angle of vision. The closer up, the wider it would be. Where you use a six inch focus lense or an eight inch, you would have about the same vision as with the natural eye. I was using an ordinary eight inch focus lense.

Defendant offered in evidence photographs "A", "B", "C" and "D", being exhibits of defendant. The same are attached marked Defendant's Exhibits A, B, C, D.

132 SAMUEL SMITH, sworn for the defendant testified:

I am working for the Southern Railway Company now as section foreman. In August 1911, I was track supervisor. As track supervisor I was connected with the North Inman Yard around the Old Sweat Bridge. As track supervisor it was a part of my duty to have taken up cross ties from off the tracks. I did not personally do it. I just instructed them to fix them. In August 1911, I looked over that track, it was three days after this man was hurt. I heard of it and went down there and looked over all the yard—looked all around there. I didn't see anything within ten feet of the track. Prior to that time, I had not known of anything being adjacent to track 27. After I heard of him being hurt I went to look and couldn't find anything. I inspected the yard in the neighborhood of every ten days. My territory is North Inman Yards and Armour and to 61 mile post between here and Macon. I get over that track in the North Inman Yards about twice a week.

As to when was the last day immediately preceding the 26th day of August 1911, that I walked along the east side of track 27—I couldn't tell you about that track. I didn't walk along the track twice a week. I hope you didn't understand me to say that I walked over them twice a week. But I went there to see our section foreman and would walk over most of the yard. I have no distinct
133 recollection of the last time I did make any personal and direct inspection of the left side of track 27—not exactly, but I had been along there within a few days; I think it hadn't been many days.

I went to track 27 to inspect the east side of it because I had heard of this accident and went out there to see. I had walked through there within a few days before the accident, looking over it.

The last time I saw track 27 before the 26th day of August 1911 was probably a few days. It hadn't been very many days because it was my business to walk over and inspect the tracks in there once or twice a week. I had a very large territory. I had charge of the Armour yards and all the yards in the city of Atlanta. It is a very good job itself, to see those, see that they are properly inspected and looked after. In addition to that, I was in charge of 81 miles south of here towards Macon. It was Mr. Cowen's business to take the crossties out of there. There was not very much grass growing along the side of the track,—might have been a little, it was filled in—

was filled in there with cinders and slag, quite a lot of that. It was in the early spring 1911 that it was filled in, I believe it was in February. I am not prepared to say that there wasn't any grass there, but I know inside of the tracks there wasn't very much in between the rails. On the outside there wasn't very much grass for about two or three feet from the end of the ties. I have
134 no distinct recollection of the exact distance. All of this matter, is dependent largely on my mental impressions resulting from the fact that I am accustomed to do these things but that I haven't any distinct recollection as to the particular condition. I do not know whether any cross ties were removed from the side of the track within three days from the time I reached there. I didn't see any when I made my inspection. That was three days after the accident. When I made my inspection, there were no cross-ties there, three days after that.

R. L. COWEN, sworn for defendant testified:

I work for the Southern Railroad now and was working for them in August 1911, at the time that Mr. O'Berry got hurt. I am section foreman now and was section foreman in August 1911. Prior to August 1911, say within thirty days prior to that time, the time that Mr. O'Berry got hurt out there in the collision, I had not taken any crossties out of track 27. I recall the occasion when Mr. O'Berry got hurt. I couldn't give you the date.

It was my duty out there to change the ties in the track, take out defective ties and put good ones in. I went over this track shortly after the time that Mr. O'Berry was hurt. I was there next morn-
135 ing after the accident. I did not make any inspection of this track 27 the next morning. I only noticed around where the accident occurred to see if there was anything wrong with the track. That's what I was looking at it about. I heard that Mr. Puckett had been injured over there the next morning. I didn't try to do anything the next morning. I went to the yard office just as I do every Sunday, as I always do, went up there on Sundays. A heap of times the track is tore up or it spread and the fellows tell me about it and I go down there the next morning, get the men and probably fix it. The next morning I went up to the yard office, and I heard all the boys talking about it. I don't remember who—they told me that a fellow named Puckett got hurt where a box car run off, something of that kind. I went down there to see about the track. I went down there. I didn't see any obstructions or anything about the track, nothing at all, might have been, but I didn't see it. This space in there between track 27 and track 28, in the neighborhood of that bridge, was used for storing old timbers, have a lot of old timbers stored in there, old bridge ties. Nothing was supposed to be stored inside of ten feet of track 27. I suppose the timbers there were stored back further than that because they had a large big space back there.

On last Saturday afternoon I measured the distance from the east rail of track 27 over to the west rail of track 28 about 100
136 feet south of bridge. The distance between those two tracks there is fifty-eight feet. The distance at the bridge between

the east rail of track 27 and the west rail of track 28 was 93 feet. There is a little path on each side of track 27. I measured the distance ninety feet north of the bridge between tracks 27 and 28. The measurement was from the east rail of that track, down that hill, to the west rail of track 28. I measured it. I disremember just exactly but it was one hundred and some odd feet. A hill separates the two tracks there. I did not as track foreman at any time prior to August 1911 leave any old crossties within two or three feet of the east rail of track 27 north of the bridge.

I don't know when was the last time that I had occasion to go out to that place before the 26th day of August 1911 to the spot where Mr. Puckett was hurt. I nearly always go down the lead and look down the track and probably down that track as far as the transfer. The lead is the main siding. It has a great many lateral tracks leading off from it. When anything was reported wrong with either of those tracks I went and inspected the track to fix it. Track 27 was one of the lateral tracks that led off from the lead track. I have not the remotest idea how far it was from the lead track along track 27 to the point where Mr. Puckett was injured. I couldn't
tell you, I didn't measure it. I do not want to get up and
137 say exactly, because I don't know. I might guess at it, but
guesses don't count, and I would rather not say. Therefore I would not like to venture an opinion at all on the subject of how far it was.

The east side of track 27 was next to this wide open space to which I referred. That wide space was used for storing old bridge timbers—not anything more than bridge timbers. The car trucks would be stacked over further up by the side of them. I would rather not say that it was a place that was appropriate for the storage of timber. It was there when I went there. I have never seen a cross tie, any ties taken out of track 27 since I have been there, until last year, 1913. I took none out of track 27 in 1911. There wasn't any ties along east side of track 27 at the time Puckett was hurt unless they had been put there by someone. I do not know whether anybody else had put ties there. If they had been put there they wouldn't have been there long because I was right along there a few days ahead of it. I never walked along the east side of track 27 there because I could see mighty well all along the east side, and I can tell about it, but I don't know just how far it was down there. I would not like to correct my testimony and give the distance from the lead tracks down there.

I report to the track supervisor and he to the road master
138 and it goes on up to the higher official.

I say there was not any cross ties there. I say in reach of my eyesight. My eye could not be mistaken at all about it. Never have fooled me, not close by.

I was there in the yard all the time. That was my work. My work carries me over all these tracks, working in and around the tracks. We have instructions to go over the tracks twice a week in the whole entire yard. I was down that lead on Saturday and Puckett was hurt Saturday night. My inspection was over those tracks as far back as the transfer. There were no obstructions inside of te

feet of the track—if there had been any I could have seen them, to my knowledge. If there had been any there I could have seen it. I don't know of any occasion that cross ties could have been put on the east side of track 27 north of the bridge. There were a lot of old bridge ties stored away back outside of the space over there on the Southern Road. No ties had been taken out of that portion of the track there, or put in during 1911. I came there nearly four years this March. Track 27 was new when I first came there.

As to how many tracks would be between me and 27, down in the neighborhood of the bridge when I am on the lead. Here is the thing about that. You take this side here, you come along here, here is a track here, and a track here, and probably they lead off
139 both ways, and you can see all across the tracks in the yard there. I don't know whether there were any cars on 27 the day that I passed there. I could not tell how many were on 26. That yard is not one of the busiest in the city of Atlanta right there. They do more business over at the hump, and the leads away from that. They are moving there all times, day and night. There are always cars standing on these tracks, 25, 26, 27, 23 and 22 at the transfer. Opposite this place where Mr. Puckett was injured, cars stand there occasionally, sometimes on 27. Cars are put there to be worked on. They don't stay in there very long, just long enough to fix them if there is anything perishable. I am not prepared to say that as I went down that lead there were no cars on 23, 24, 25, 26, 27, to obstruct my vision. I do not say there were not any cars, I don't remember, but if there was I would have seen the track. I could see up every track easily. As I crossed them I could see up the track. As to whether I have a distinct recollection of looking up track 26 to see if anything was the matter with it, I say I always look at all of them every time. I went along there and looked up all of them. You are supposed to have no old ties, timbers, parts of cars, that somebody might get hurt, apt to get their leg or arm broken—there was nothing like that there. It was the same thing as to 27.

140 H. M. GILMER, Sworn for the defendant testified:

I witnessed application by Henry E. Puckett for the position of car repairer of the Southern Railroad Company. Mr. Puckett signed it in my presence. I asked Mr. Puckett the questions in this paper. I asked him his full name and he answered Henry E. Puckett. He evidently wrote those figures. I asked him his age and he said 32 years. I am inclined to believe he wrote that himself. I don't remember whether he filled in the answer, 165 lbs., as to his weight. He signed this paper in my presence. I don't remember anyone that was present except he and I when this paper was prepared. I suppose Mr. Puckett knew what was in the paper, he read and answered the questions. He signed it and I witnessed it. This paper appears to have been prepared on the 24th of April 1908. If my name had not been signed there as a witness I do not know whether I could remember anything about this transaction at all, about Mr. Puckett coming to me for his application, because

there are so many employees coming there and going. I didn't hav
any distinct recollection about that at all. I can see I was a wi
ness to the signature and I know he was in my presence at the tim
that I witnessed the signature. I know by my signature being on
that he was employed by the railroad company. I can't recal- th
exact date I next saw him after the date that he signed hi
141 name to this paper. I saw him at various intervals. He w
never examined before me again. I was chief clerk of the c
inspector and repair department. Independently of this memoran
dum—Age 32—I have no distinct recollection at all that he told m
his age was 32, or that he said that his weight was 169. I am n
prepared to say of my own knowledge, and of my own recollectio
that those figures, as to the age, were actually written by Mr. Pucke
only from the evidence in the paper. I get that from the pape
but I have no recollection of any of those things having transpired
except that I do know the paper was completely filled out before
witnessed it. When I say completely filled out, I mean all t
questions in the paper were answered, so far as he was required
answer them. I am not prepared to say that he filled them out,
my own knowledge. I don't remember exactly, there may have be
somebody else in the office who assisted. I have no distinct recolle
tion on that occasion of asking him what his weight was or age was.

I do know that this application was taken, that my signature
on the back of it as a witness. I took it and witnessed his sign
ture after it had been completely filled out. I could not say that
was completely filled out in my presence or whether it was in t
other office. I do know that it was filled out there. It w
142 required by the railroad company that this defendant, be qu
tioned as to his age, weight and height and that this inform
tion be given by men who were applying for positions by the Ra
road Company.

J. W. WHITTAKER, Sworn for defendant testified:

I am working for the Southern Railway Company, as Gener
Yard Master, and was working for them in August 1914, at the ti
that Mr. O'Berry was injured in a collision in the North Inm
Yards. I heard that Mr. Puckett claimed to have been hurt at t
time, on Sunday morning, between nine and eleven o'clock sometim
That was Saturday night and this was Sunday morning. I heard
the Sunday morning following. At that time I inspected the wh
lower yard from track 20 to 27. I did not at that time, on the Su
day morning following the alleged injury of Saturday night, disco
any cross ties lying within two or three feet of the east side of tr
27, north of the Sweat Road bridge. If there were any there I fai
to see them and I was there for that purpose. After this time I w
to see Mr. Puckett at his home on Sept. 22nd. My purpose in go
to his home at that time was to carry him his pay check. M
Puckett told me at that time how he had gotten hurt. He said
stumbled over cinders and fell with some blocks that he had on
back. If he said anything about cross ties at that time I don't
member it.

143 I inspected the yard myself between the tracks—each track. I am in charge of the entire yard. It is my duty to have anything moved that I see needs to be moved that is within the yard itself, or within a certain radius outside. I don't know exactly where Mr. Puckett was hurt. As to whether there were any crossties close up to the track where Mr. Puckett was hurt,—there wasn't any crossties there within a reasonable distance of the track from one end of 27 to the other, that I seen. I mean by, within a reasonable distance of the track, three or four feet. I mean outside of the rail—at least seven or eight feet from the center. The distance between the rail is four feet nine or four feet eight and a half inches. Then, from the outside of the rail for the distance of three or four feet I didn't see any ties. There were no clinkers along there, none of any unusual size. We are supposed in the yard to have clinkers all over it. This was not a perfectly level space between the outside of track 27—that open space between 27 and 28.

The car inspectors from time to time would be required to go over there on the outside of 27, in checking up, if they filled the train from track 27. They inspect it on that side, and one inspector on the other, that is the way it is done. They are required to pass along up and down the track. Mr. Smith would inspect the train. He is back in the room there.

144 As Chief Yard Master I had the Southern Yards in Atlanta. The space between 27 and 28 is the Southern Railroad's property; we don't consider that as the yard, don't use it as the yard. We sometimes use 27 and 28. We use them all the time. The space between those two tracks is in between the yards, that space is in between two distinct yards. I have no jurisdiction over that space more than to see that nobody trespasses over that space, don't use it for anything at all. I don't have any duties in connection with that space except to see that nobody trespasses. Just like a piece of vacant property.

The switch tracks were usually full up to the platform. Below the platform they were never filled, only at night. I remember where his derailment occurred. It is not true that along in that neighborhood those tracks are usually filled with cars. I don't know where Puckett was injured. I know where Mr. Smith said he was injured. Between the lead track and that point that was pointed out to me, those tracks were not pretty well filled with cars. No cars are ever allowed to stand on track 27. We place cars in track 27 to be repaired. Cars that stand in there that are used in switching trains are only there at night. We don't handle any traffic there in the daytime. No switching is done in the daytime in that end of the yard, because we switch from the upper end—the south end in the

145 day time. I am not prepared to say that at no time within three or four days before Mr. Puckett was injured a man passing along the lead track and looking in the direction where Puckett was injured, would have had an unobstructed view of that place. In other words there were no cars standing there at all—probably there might have been a time when cars would be standing there. If there had been three or four cars standing there he could

have seen them, but if it had been all of the train in there, could
have seen the ties, I mean by all of the train, all of the train to
inspected. That would have occurred during the daytime on 27 b
no other track but 27. 27 is the only track long enough to hold t
train. A man on the lead track who went up and down the le
track, he would go right across the end of 27 as it entered the le
track.

C. G. LEE, sworn for plaintiff in rebuttal, testified:

I know H. E. Puckett. I have known him now some three yea
or more. I knew him in 1911. At that time I was switching for t
Southern. My yard foreman was Walt Lindsay. I have seen W
Lindsay here today. I remember the night that Mr. Puckett w
hurt. At the time of the derailment of that engine and cars
track 26, I was sitting down over there just opposite a telegraph p
waiting to get merchandise on the north end, 75's merchandise.
was standing right as close as from here to that post (in
146 cating a post in the courtroom) I suppose, when it happene
I saw Mr. O'Berry caught under the car. I run over the
where he was. I saw Mr. Lindsay that night. Mr. Lindsay s
something to Mr. Puckett about going and getting some jacks a
some blocks. He asked Mr. Puckett did he know where there w
any jacks and Mr. Puckett told him yes, and so he told Mr. Puck
to go and get them, and Mr. Puckett told him he would — to h
somebody to go with him. He told me to go with him. I went w
him. A negro went with me and him. I don't know who he was
don't know his name. I brought a jack, helped to. I saw M
Puckett that night and went with him after the jack and bloc
Two men and a negro went with me to get the jack. Mr. Puck
had to get the blocks. Mr. Puckett was ahead of us going up.
did not see any crossties that night until I stumbled over them w
my foot. I was walking along with the jack, and had this hand, t
way next here on the other side—I was walking in front of the ot
man there opposite track 27 and I struck something with my fo
stumbled a little, and I looked down to see what it was and it w
crossties. I come on with the jack and just as I got on the other s
of the ties, Mr. Puckett struck them and fell. I went on arou
cast my eyes around, I never stopped any more.

There was grass around the crossties. That grass was ab
147 18 inches high. The ties lay with relation to the ties in tr
27, right straight out from them. From the end of the
that I stumbled over to the ties that were in the track was about
or 18 inches. I didn't fall. The jack is supposed to weigh about
pounds. It was a large jack, about like that (indicating) made
iron. The men carry it by the hand-holes on either side. I had
right hand over here on one hand-hold and the negro had hol
the other. He was behind it and I was in front. I was walkin
front and he behind because it was close in there. The passage
was narrow.

I had known Mr. Puckett before this occasion, I suppose, abo
year. I was with him over there in the North Inman yard, b

here for six months, working there every night. I never did examine him, he looked as well as any man I guess. I never saw him undressed. He did not have any limp in his walk. I saw no indication of one leg being shorter that the other, walking in such a way that you would observe it. If there had been I guess I would have noticed it.

I don't know positively whether my engine was standing still or not, but he was going to come up behind this engine so as to get down there and get some cars of merchandise that were to go into 75, to go to Anniston. After O'Berry was taken out we come 48 to town. I didn't have this engine to put in there.

I was one of Mr. Lindsay's crew. Mr. Lindsay asked Mr. Puckett did he know where any jacks were and Mr. Puckett told him he did, and Mr. Lindsay said, "Go and get them," and he told him he would have to have somebody go with him, and he told me to go with him.

I didn't hear a conversation as follows: Mr. Puckett got there and didn't say,—Are you going to let this man die this way—and Mr. Lindsay said, "You go over yonder and get a big jack"—That wasn't the conversation. I was right there with Mr. Puckett and if there had been such conversation I would have heard it.

Mr. Puckett was hurt on the east side of 27. The space on that side was very narrow. There isn't any space there from 60 feet to 90 feet,—not before you get down further—there is a low place, but there was a little narrow place right up there by the side of his crossties. I don't know that track 28 was over 60 to 190 feet away from 27 in different portions of the yard. Old timbers that had come out from the bridge were not stored in that space at that time. I didn't see any stored in there. South of the bridge there was nothing stored in there between track 27 and 28 that I know of. I don't know anything of a little shack between 27 and 28.

49 I am not positive which one of those tracks—28, 29, 30 and 31—were repair tracks, but some of them were repair tracks. There were cars on this track 27 that night. I am not positive how far it was below the bridge that Puckett fell down, I never measured it, it was something like three or four car lengths. When I say below, I mean back towards North Inman. Most of the cars are about sixty feet long I think.

I worked in the yards about three years. I started in 1909 and worked until 1912. I am farming now.

I would say that Mr. Puckett fell down 250 feet north of the bridge. It was at least 250 feet north of the bridge where I saw those two ties. I am positive about that. If Mr. Puckett states that it was between 90 and 120 he is mistaken about it.

This negro and I were carrying this great big heavy jack right in front of Mr. Puckett, about seven or eight feet, and this jack that the negro and I were carrying weighed about 200 pounds. I had hold of one end of it and the negro had hold of the other end. I was in front. The negro was back between me and Mr. Puckett. I was walking along the narrow space, and of course was headed north, and the negro was headed north; both were in front of Puckett. I

was walking pretty fast. I was walking as fast as I could with this big heavy jack. I was not running. Mr. Puckett was not running. I am certain Puckett was not running. I don't know whether
150 Mr. Puckett knew that I saw him fall down. I stopped looked back and I went on. I had to go, before I got to track 26, about three car lengths. It is about three car lengths that I had to go from the point where Mr. Puckett fell down—about between 125 and 150 feet. I had to go 125 feet from where Mr. Puckett fell to get to the end of the car. To get to the car where the collision occurred, I had to go around those cars and come back up to this engine. I reckon that was a couple of car lengths from the end of the car back up to this engine. I suppose that is about 100 feet after we got to the end of this car. So, from where Mr. Puckett fell down to where I had to go to the collision was about 250 feet—150 feet to get to the end of the car and a hundred feet to get back by the car would be 250 feet.

I looked at these two crossties. The crossties were north of the bridge about 250 feet. The end of the crossties were from the rail of track 27 about 12 or 18 inches. It wasn't as far as 3½ feet. It wasn't 2½ feet. I am positive about that. I stopped and looked at them. I had my lantern with me.

Mr. Puckett was just about as stout as he is now. About as large looking as he is now. I don't know about his stoutness.

After I got around there where the collision occurred, I did not go back where Mr. Puckett was. As I was going toward
151 the collision I saw back of me that Mr. Puckett had fallen down and I didn't go back to him at all. I looked back, I seen him fall. I heard him as he fell. I didn't go back to him then, I just kept right on.

The following rules of the Southern Railway Company were put in evidence by the plaintiff:

"L. In case of danger to the company's property, employees must unite to protect it."

On pages 151 rules 814-816 relating to the duties of the track supervisor, as follows:

"814. They must see that the road-bed and tracks and everything pertaining thereto are maintained in safe and proper condition and in all respects in accordance with the prescribed standards; that ample provision is made for drainage; that culverts and other waterways are kept open; that landslides are guarded against; that trees, rocks, and other objects along the road which are likely to fall upon the track are removed; that the right-of-way is cleared of trees and bushes; that the grass and weeds are cut in proper season; that fences are kept in repair, and that all brush, weeds, worn-out ties, timber and other rubbish are collected and promptly burned."

Rule 816 also offered, which is as follows:

152 "816. They must not allow lumber, timber, ties, rails or other freight or material to be piled within ten feet of the main track or within 7 feet of any side track."

Also rules 850 and 852 on page 158 of rule book relating to duties of track foremen as follows:

"850. They must cut off all grass and weeds upon the right-of-way and grounds before they ripen."

Also 852 as follows:

"852. They must not allow lumber, timber, ties, rails or other freight or material to be piled or placed upon the ground within ten feet of the main track or seven feet of any side track, and must see that all such freight or material left near the tracks is so placed that it cannot fall upon or near them.

Also rule on page 166 of rule book, as follows:

"894. They must collect ties, timber, rails, frogs and other material and fixtures taken from the track or structures or falling from passenger trains, once a week. As soon as they have been inspected by the Track Supervisor, they must be assorted in accordance with such inspection, all condemned ties, timber and lumber must, unless otherwise directed, be burned. Second hand material and scrap must be properly stored. Grass, weeds, and other rubbish cut or accumulated upon the right-of-way and grounds must also
153 be promptly collected and burned."

The rule book introduced in evidence showed that Rules 814 and 815, admitted in evidence, are rules under the heading of "Track Supervisor." Rules 850 and 852 and 894 admitted in evidence are under the heading, "Track Foreman."

Rule 796 on page of rule book relating to duties of yard masters was introduced in evidence by the defendant. This rule was as follows:

796. They must see that their yards are kept in good order, that links, pins, scrap and other material scattered upon the ground are promptly collected and stored, and nothing is allowed to remain upon and between the tracks that involves risks to property or persons.

It was agreed between counsel for plaintiff and defendant that the court in considering the admissibility of the rules of defendant which were introduced, should inform himself relative to said rules by a reference to all the rules in the rule book of defendant company, and in pursuance of said agreement the court did so inform himself and it was stipulated that in event of an appeal in this case the rule book should be attached to the brief of evidence in order that the Appellate Court might consider it in the same way that it was considered by the trial court. The rule book is so at-
154 tached, identified by the court. Defendant brought into court under a notice from plaintiff to produce two original bill of lading for Southern car 34980, and introduced, the bills of lading issued at Augusta, Georgia, August 17th, 1911, by the Southern Railway Company, and covered two shipments made by the Riverside Mills of Augusta, Georgia of forty (40) bundles and 24 bundles of ties consigned to the order of the Riverside Mills and covering shipments consigned to Order Notify A. G. Williamson, Eastman, Georgia; the destination of the shipment being Eastman, Georgia. These bills of lading did not contain any car number or initial.

Defendant introduced in evidence the original application of

Henry E. Puckett for the position as car repairer to the Southern Railway Company. This application was dated April 24th, 1908 and was signed by Henry E. Puckett in the presence of H. M. Gilmer. In this application Henry E. Puckett, plaintiff, gave his name as Henry E. Puckett; his age as thirty-two (32) years; his weight as one hundred and sixty-five (165) pounds, and his height as five feet and ten inches.

Defendant offered in evidence skiograph marked "Defendant's Exhibit F."

Plaintiff offered in evidence defendant's switch list, which showed Southern Car 34960 destination Eastman, Ga.

155 Plaintiff introduced an annuity table.

We agree that the foregoing brief of evidence in this case is a true and correct brief of the evidence.

This June 23, 1914.

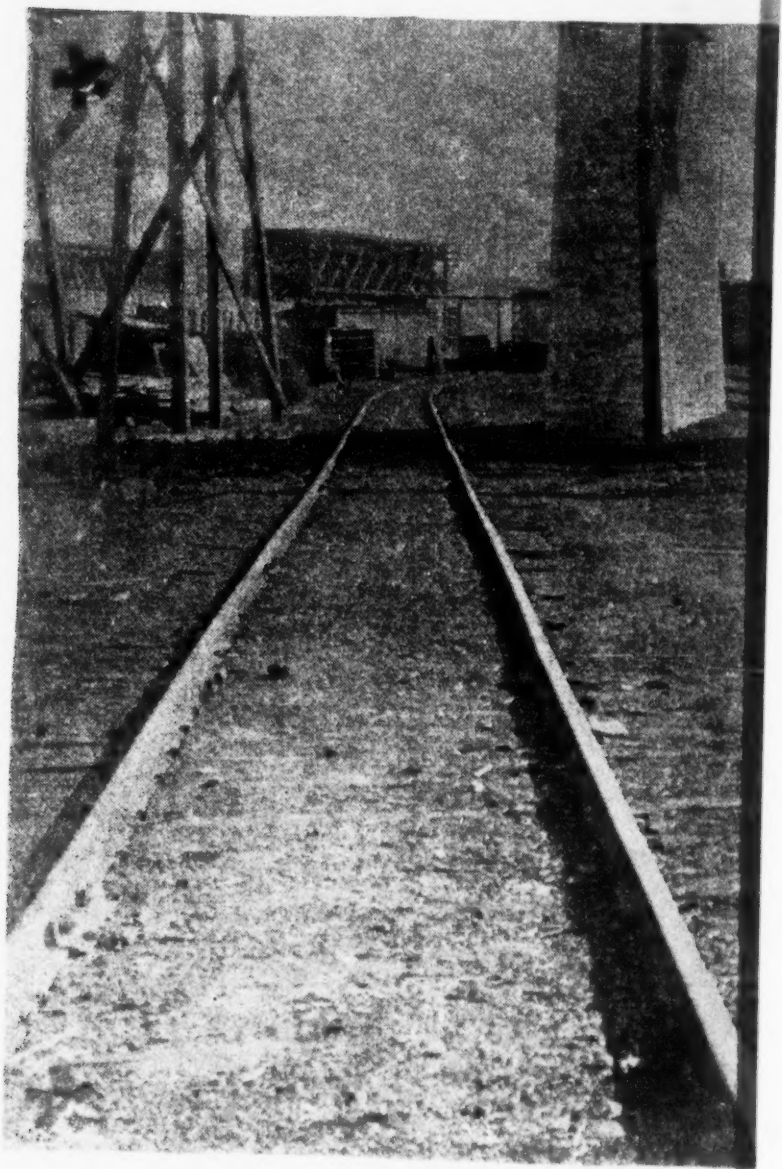
ATKINSON AND BORN,
Att'ys for Pl'ff.
McDANIEL AND BLACK,
Att'ys for Def't.

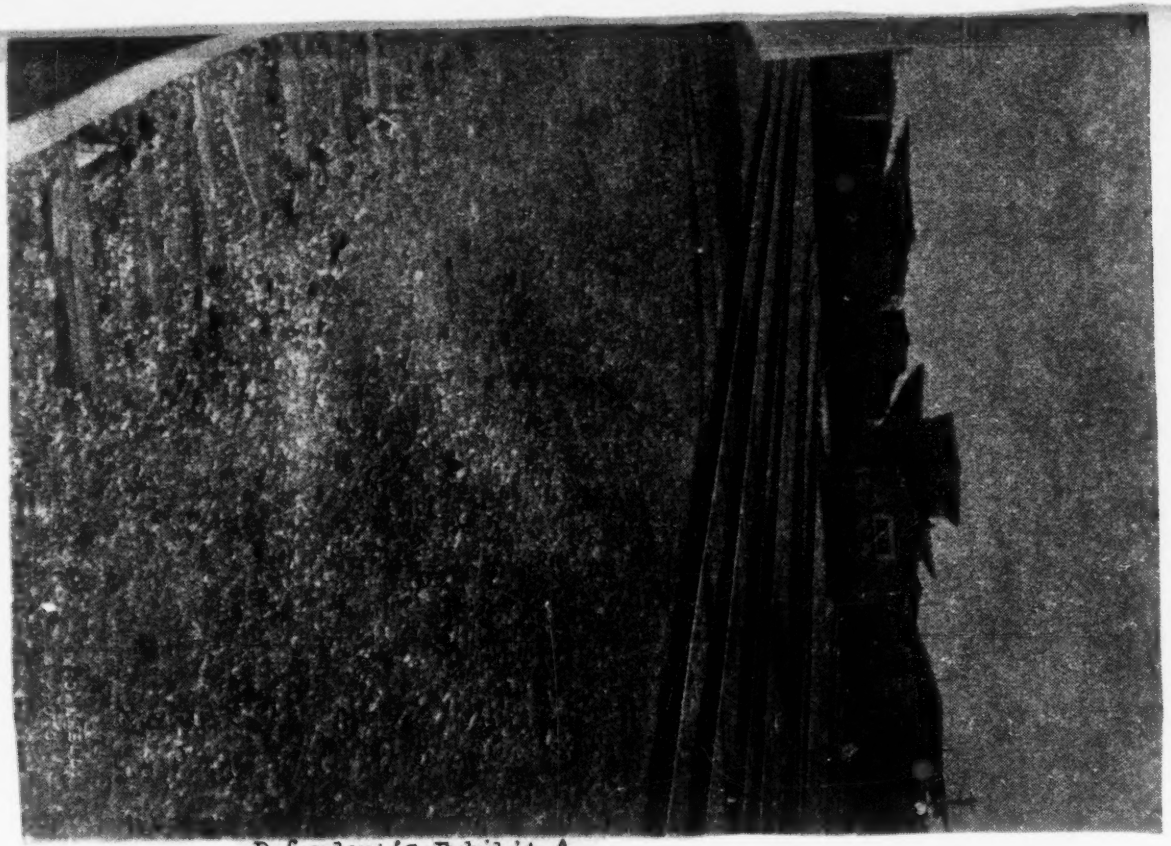
The foregoing brief of evidence in the case of H. E. Puckett v. Southern Railway Company is approved as true and correct. June 23, 1914.

H. M. REID, *Judge.*

Filed in office this the 23rd day of June, 1914. S. T. Conyers D. Cl'k.

(Hence follow photographs marked pages 156, 157, 158, and 159.)

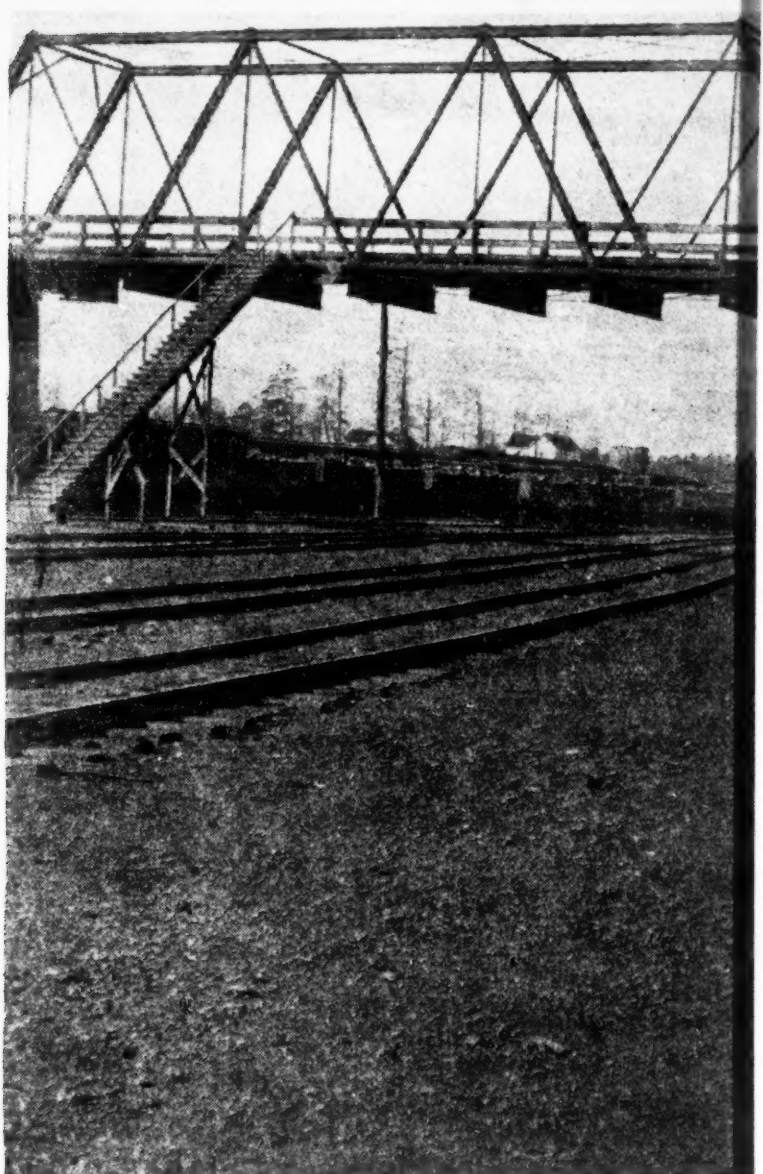


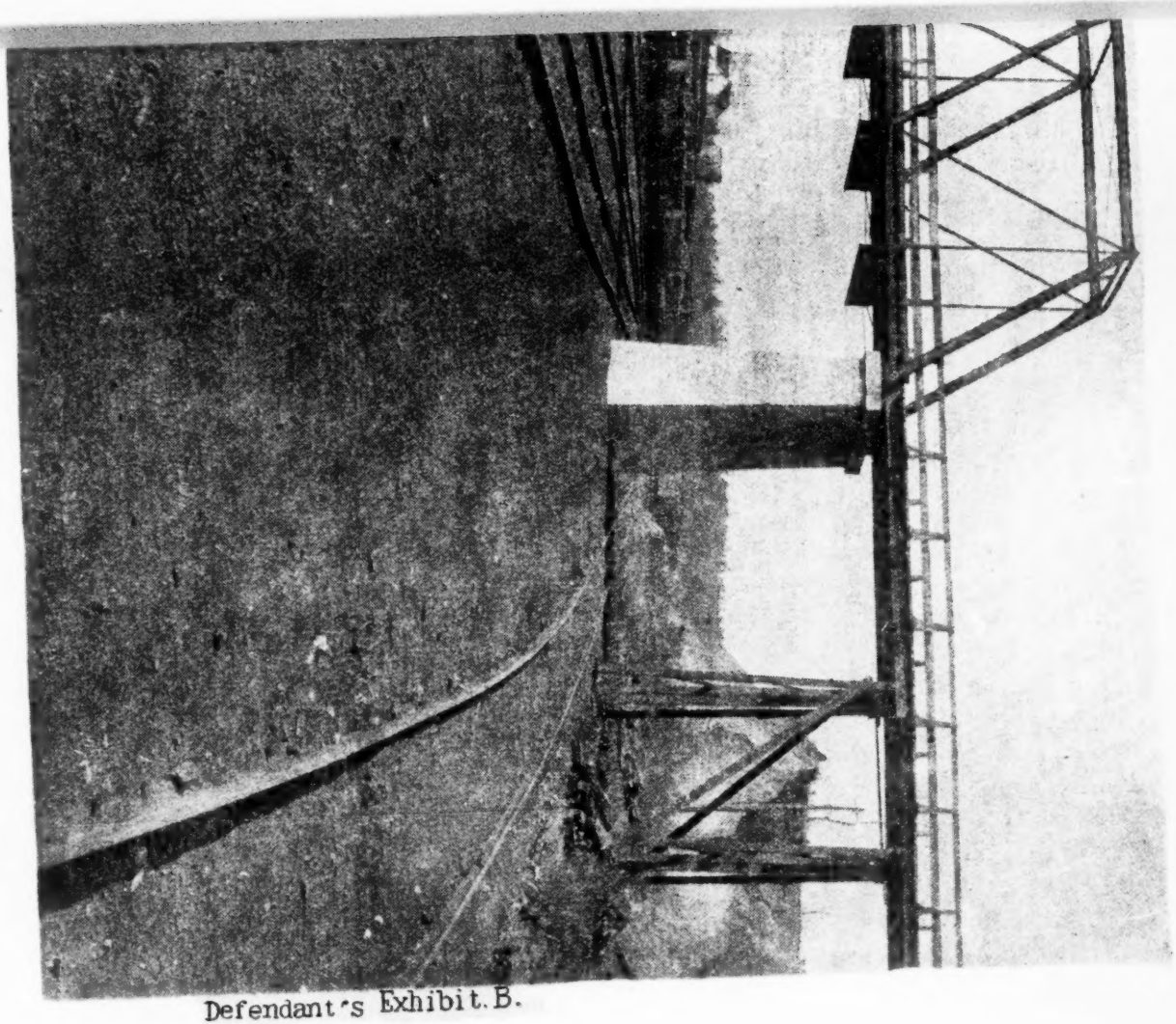


Defendant's Exhibit A.

No. 598
So. Ry Co.
v.
Puckett
p. 156

156

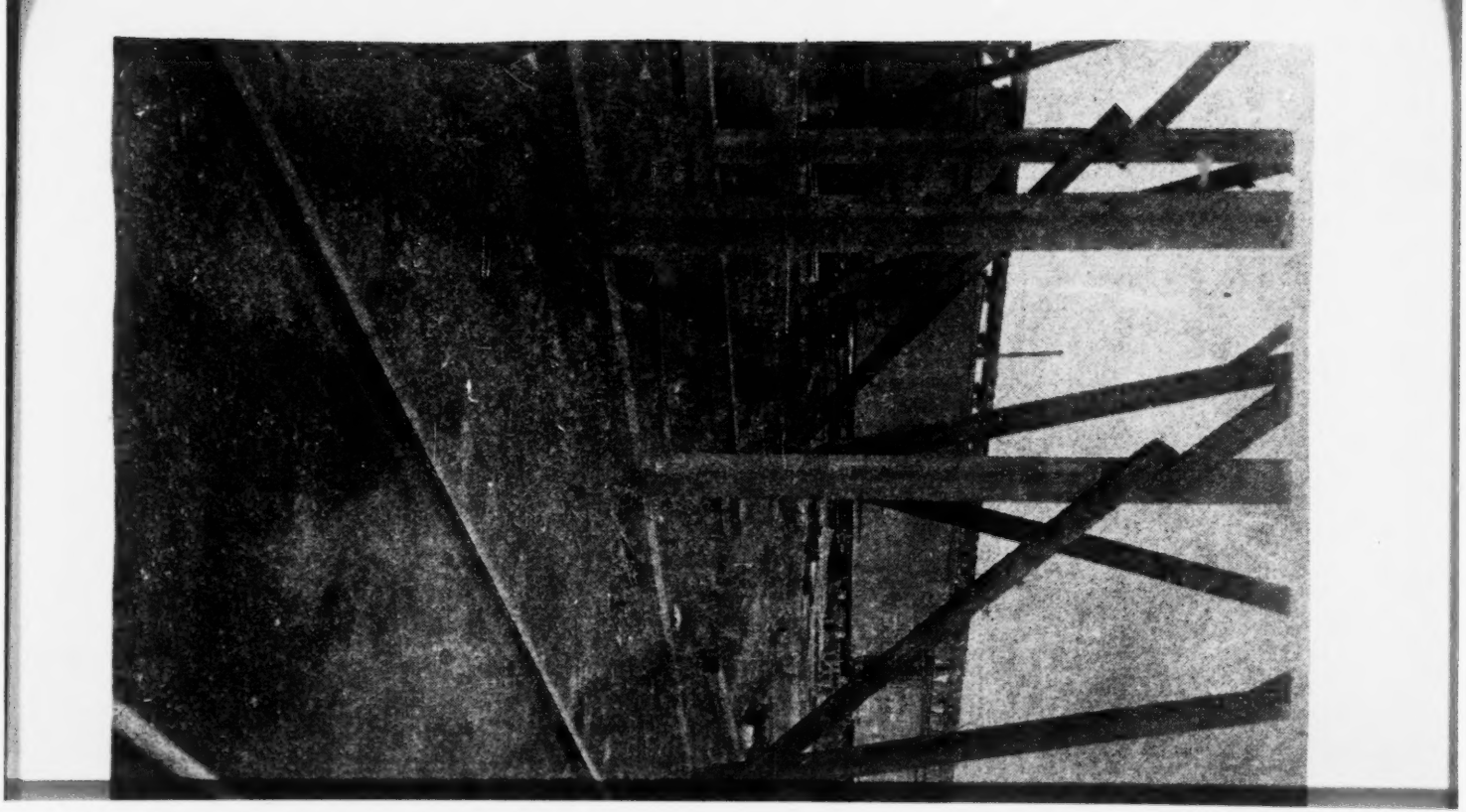


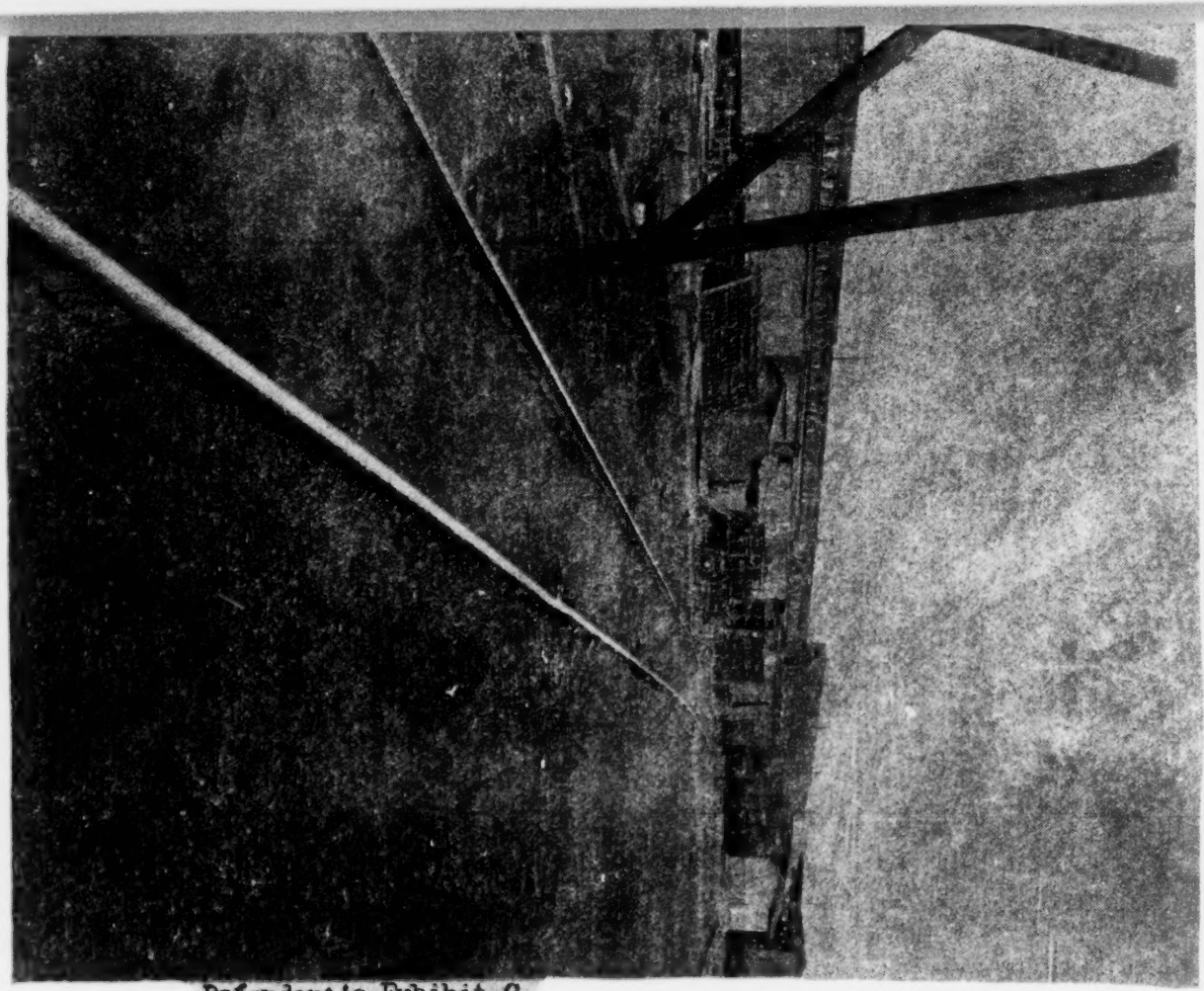


Defendant's Exhibit. B.

No 598.
So Ry. Co
v
Puckett
} p. 157.

154

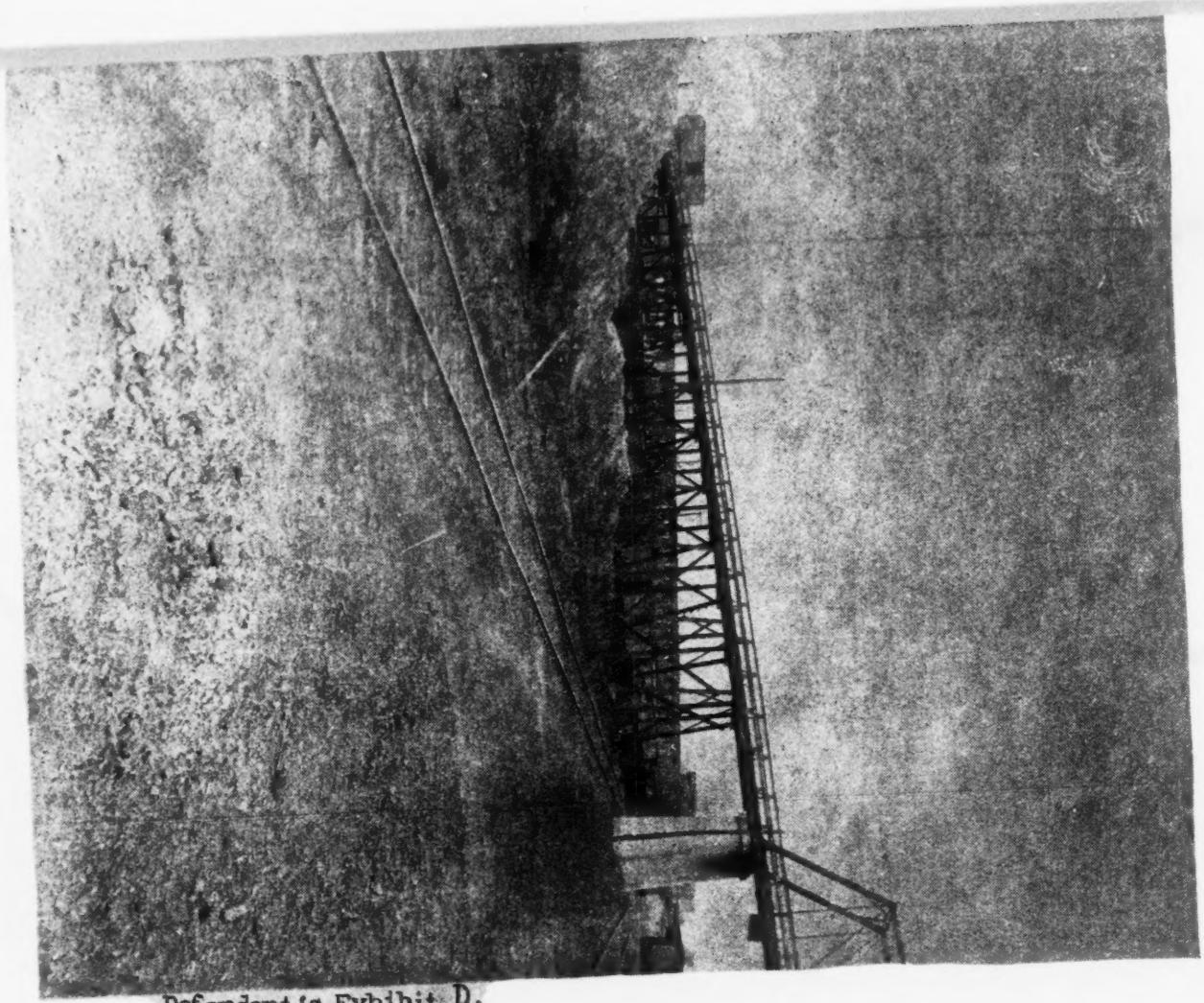




Defendant's Exhibit C.

No. 598.
So. Ry Co
v.
Puckett
p. 158

158



Defendant's Exhibit D.

No 598.
Ga. Ry. Co.
v.
Puckett
p. 159.

159

160 [Book of Rules.]

161 (*Charge of Court.*)

Gentlemen of the Jury:

This suit was brought by H. E. Puckett as plaintiff, against the Southern Railway Company as defendant and it was brought originally also against R. L. Cowan and Samuel Smith, individually as defendants. These parties, the individuals, have been stricken from the case. So, if you read the petition when you are in your room you will understand that these two individuals are not parties to the suit.

The case is filed under what is known in the law as two counts, count No. 1 and count No. 2. The entire first count has been stricken from the case and it will not be in the case at all. But, the case pending begins with count No. 2, which is at paragraph 35, and, from that count, these individuals having been stricken as parties, the case is pending in the name of H. E. Puckett as plaintiff against the defendant, the Southern Railway Company.

And, the plaintiff alleges that the Southern Railway Company is a railroad corporation doing business in this county and that the defendant has injured and damaged the plaintiff in the sum of thirty thousand dollars; and on the occasion referred to in this suit the plaintiff was in the employment of the Southern Railway Company as car inspector; that on or about August 26th, 1911,
162 about 10:40 o'clock at night, the plaintiff was seriously and permanently injured in the manner set forth in his petition, and that he was injured in this state and county; that at the time the Southern railway was a common carrier engaged in interstate commerce.

By an amendment it is set forth that a certain train was being made up which was to go beyond the State of Georgia into another State and that the train was known as train No. 75 and that its destination was Birmingham, Alabama. And there is set forth, gentlemen, in the petition and amendment quite a large number of cars, by numbers and designation which the plaintiff charges were in that train and were carrying interstate trade.

He alleges that train No. 75 was due to leave Atlanta for Birmingham at 11:30 P. M. that about fifteen of the cars out of the list that were to go in the train were coupled to the engine at the time of the collision, the exact cars coupled to the engine at the time of the collision, plaintiff is not advised of.

That on the occasion referred to A. P. O'Berry, a switchman of the Southern Railway Company, had been caught in a collision between an engine and a box car of the defendant company in the North Inman Yard, and was pinned down between the box car and the sill of the engine; that the box car had been set on fire by the bursting of the oil head-light and O'Berry was in great danger
163 or losing his life both by fire from the burning box car and being mashed to death by the box car, and it was the duty

of the plaintiff to assist in rescuing O'Berry from the wreck as we
as to assist in clearing away the track.

By amendment the plaintiff alleges that at the time of the co
lision he is not advised as to the exact cars that were coupled to th
engine, but that the same were cars which were to be placed b
the engine and crew in train No. 75 and further, alleging that
was his duty to help get O'Berry from his perilous position and al
to aid and assist in jacking up the car and thereby releasing O'Berr
from the dangerous position in which he was caught, and that h
was discharging this duty, and that it was a duty which was impose
upon him by instruction from a higher employee of the company
that the instructions were given orally to the plaintiff by A.
Gilleland, who was chief car inspector of the defendant compan
under whom the defendant was at work at the time, and whose orde
he was in duty bound to obey, and that Gilleland had authority
give him the instructions, as stated.

And he alleges that on the date of this collision, that at the ex
time of that collision, and for some time theretofore, he had be
engaged in inspecting cars that were to be incorporated in train
of the defendant, which was scheduled to leave Atlan
164 that night carrying through freight over the line of th
defendant's road to Birmingham and other points in th
State of Alabama; that at the time of the happening of the collisi
he had already inspected twenty or twenty-five of the cars destin
to compose the train and these cars had been placed on the track
which the train was to be made up and that he was at the insta
of the collision making out a record of his inspection, when his wo
in making out the record and the inspecting the remainder of th
cars, that is to say, twelve or fifteen additional cars that were to
in train 75, was interrupted by the collision happening upon a
blocking the track over which the remainder of the cars were
pass in order for him to inspect them; so that by the collision the c
could not pass over that track, but were compelled to be detou
over another track.

He alleges that there are a number of tracks in the yards; t
the track furtherest east is known as the "lead track" from the tra
fer and is also known as track No. 27; and that this track was al
25 yards from where the collision occurred; that in order to get s
blocks to use in jacking up the box car, and to release O'Berry
well as to clear up the wreck, it became necessary for the plai
to go across the lead track; that after he had gone across the
track and had placed the blocks on his shoulders, the blocks be
approximately, one, three feet long, and five inches by nine in
in thickness, and the other about three and a half feet l
165 six by fifteen inches in thickness, he started with them a
the side of the lead track for the purpose of going ar
some box cars standing on the lead track, so as to reach the poi
collision.

That lying within one or two feet of the lead track and at a
right angles to the track were two old and worn out crossties;
within four or five feet of the crossties there were three or

clinkers about six or eight inches in diameter, and these clinkers were lying about one or two feet from the track, that it was dark and plaintiff could not see the clinkers or crossties; that grass had grown around the clinkers and crossties, preventing his seeing them. That when he reached the clinkers he stumbled over them, which started him, and then he struck in his stumbling the two crossties which threw him heavily to the ground, falling with his face to the ground and the two heavy blocks he was carrying falling heavily on his back, seriously, dangerously and permanently injuring the plaintiff, as he calims.

That it was the duty of R. L. Cowan, track foreman, to keep the track and road bed free from obstruction and of grass.

That it was the duty of Samuel Smith, track supervisor, to keep the track and road bed free from obstruction, grass, and other growth such as he fell over.

166 That it was the duty of J. N. Biddy, road master, to keep the track and road bed free from obstruction and grass, and that these people, designating each of them, were negligent and failed to do their duty in the premises and in the particulars in which he charges the duty was upon them.

He alleges that he did not know that the obstructions, that is, the clinkers and crossties were on the road bed, and that in and about the premises he was without fault.

That he received serious, dangerous, and permanent bodily injuries, that he described thus, that his back was injured, the muscles thereof being strained and bruised—that his left kidney was injured and bruised—that he passed blood through his urine—that the small of his back was injured—the spinal column being bruised and wrenched—his left shoulder and left hand sprained—left arm bruised and injured—the left sacra iliac joint injured, twisted and bruised, and that he received a severe nervous shock and that he was confined to his bed for 37 days.

That on account of the injuries he was for the time being wholly disabled and unable to complete the inspection of the remainder of the cars destined to and which did thereafter go into the train mentioned, and that the departure of the train was delayed for the space of one hour or other long time, impeding, interrupting and

167 delaying this train on its journey—and he restates the particular, gentlemen, in which he says he was engaged in interstate commerce.

By an amendment, gentlemen, he alleged that prior to the infliction of the injuries, he was able to and did, in the prosecution of his daily work use his legs in a perfectly normal manner, that they were of equal length and that they sustained an equal proportion of the weight of his body, but that since the injuries, and as a consequence of them, his left leg has been shortened, the hip joints has become so out of adjustment that he is now compelled to place almost the entire weight of his body upon his right leg so that while standing firmly on his right foot, the left foot will not reach the ground by one inch and a half or more—that his back and spinal column have twisted and distorted so that he cannot stand in an

erect and upright position with both feet on the ground at the s
time. So, he alleges, he is now and henceforth will continue t
a permanent and helpless cripple.

He alleges that on account of the injuries he had suffered
will continue to suffer so long as he lives both mental anguish
physical pain.

That, at the time of the infliction of the injuries he was ac
strong, healthy, vigorous and well—that he was 36 years of age
an expectancy of 30.32 years—that he was capable of earning $9
per month—that since the infliction of the injuries he has
168 been able to earn any money—that his earning capacity
been permanently impaired, and that it has been redu
four-fifths of what it was prior to the infliction of the injuries.

And he brings this suit asking to recover damages and lays
sum in which he claims damages, as I have already stated to yo
$30,000.

I have stated to you, thus, gentlemen, the substance of the pl
tiff's petition and the amendments filed by him.

I call your attention now, gentlemen, to the plea filed by
defendant in the case, and a part of this plea, gentlemen, you
find refers to the first count of the petition; that has no part in
case any longer, that count having been stricken.

And in its plea it admits that it is a railroad corporation as char
doing business in this county, and it denies that it has been guilt
any of the acts of negligence charged in the declaration and it de
that it injured and damaged the plaintiff in the sum set forth in
declaration or in any other sum. As to the allegations made by
plaintiff in his petition except the allegations that charges it t
a corporation doing business in this county the defendant says ei
for want of sufficient information it can neither admit nor d
the plaintiff's allegations or else it denies them outright.
169 Further answering it denies that the plaintiff at the t
alleged by him was engaged in interstate commerce; it de
specifically that allegation made by the plaintiff.

Then there is some further pleading of the defendant, where
raises the question of the constitutionality of the act, the federal
under which this suit is brought—you will not be concerned a
with that particular part of the plea.

Then answering an amendment filed by plaintiff, the defen
avers that at the time O'Berry was injured, the engine with whic
was working had attached to it one empty car which was sent t
repair track and one loaded car whose destination was East
Georgia. The defendant denies the other allegations by paragr
of the plaintiff's amended petition—denies all the other allega
made by the plaintiff in his amendment.

I have stated to you, thus, gentlemen, the substance of the p
tiff's petition and as amended and also the substance of the de
ant's plea and as amended. To get the allegations of the part
specific detail, you can read these papers for yourselves (omittin
part of them, if you do read them, to which I have called your

ion) as they will be out with you, but I have stated to you their ubstance.

The effect of the plea, gentlemen of the jury, is to put
170 the burden of proof on the plaintiff, the party suing in the case, to show to your satisfaction by a legal preponderance f the evidence in the case that the allegations he makes are true, xcept as to the incorporation and residence of the defendant in this ounty, which is admitted.

And the preponderance of evidence by which the plaintiff is thus equired, under the law, to satisfy your minds, means the greater eight of the evidence. The law defines it as being that superior eight of evidence upon the issues involved, which, while not enough o wholly free the mind from reasonable doubt, is yet sufficient to ncline a reasonable and impartial mind to one side of the issues ather than the other.

Under the law you are exclusive judges of the weight of the evi- ence, and being so you would determine for yourselves where the reater weight or preponderance of it rests on any question you have nder consideration.

The law makes you also, gentlemen, exclusive judges of the credi- ility of the witnesses in the case. In passing on this question you ave a right to take into consideration their manner and deportment n the witness stand as they were examined in your presence—the ct of their being parties to the suit or not parties—their relation-
ship in anyway to the parties—or the absence of such rela-
171 tionship—the interest they have in the case or its result or the absence of such interest—the opportunities they had for nowing the facts about which they testified—the probability or im- robability of the facts to which they did testify, and the reasonable- ss and unreasonableness of their evidence in your opinion. And ou may take into consideration the personal credibility of the wit- sses so far as that appears to you from this trial.

The law directs, gentlemen, that it is your duty, where it can be one, to so reconcile conflicting evidence, if there be such in the se, as all the witnesses will be made to speak the truth and perjury imputed to none of them. But, if there should be any evidence the case in such irreconcilable conflict that this cannot be done, u would then believe the evidence most reasonable and most cred- le to you, and settle the issues by the greater weight or preponder- ce of the evidence.

This suit, gentlemen, is based by the plaintiff upon the alleged gligence of the defendant. That is to say, the plaintiff alleges at the defendant was negligent and that because of this negligence was injured, and he sets forth in his petition the particulars in ich he alleges the defendant was negligent. These particulars I ve already read to you and will not restate them now, but when
you come to consider the question as to whether the defend-
2 ant was negligent or not, in order to refresh your minds, you may look to the plaintiff's petition in count No. 2 where you l find these particulars or specifications of alleged negligence set h and in considering the question as to whether the defendant

was negligent or not, you will be confined to the specifications t
set forth in the plaintiff's petition. That is to say, you would
have the right to go outside and inquire whether the defendant
negligent or not in some other or any other manner than those wh
the plaintiff alleges in his petition the law being that if he recov
at all he must recover upon his case as he presents it to the court
jury in his petition—and you will be confined in your investigat
to these specifications, and even if you should be of the opinion t
the defendant was negligent in some other manner than in the p
ticulars charged, that would not authorize the plaintiff to recover
this case; the law being as I have stated to you, if he recovers in t
case, he must recover upon his case as he presents it to the court
jury in his petition.

This makes it necessary, gentlemen, the suit being based upon
alleged negligence of the defendant, for you to understand what
law means by negligence, or what is the legal meaning of negligen
and negligence is the absence of or the failure to exercise the c
required by law to be exercised—that is, negligence is the
173 sence of or the failure to exercise legally required care.
such care was exercised there would be no negligence, bu
there was a failure to exercise the care the law required, that wo
constitute negligence.

The care required of the defendant, in this case, gentlemen,
ordinary care. The legal definition of ordinary care is just that c
which every prudent man would exercise under the same or simi
circumstances. As made applicable to this defendant it means
that care which every prudent man acting as employee and serv
of a railroad would exercise under the same or similar circumstan

Then your method of inquiry would be to take the specificati
in which the plaintiff charges negligence and say for yourselves,
matter of fact, whether in reference to these specifications the
fendant exercised ordinary care, or failed to do so. If it exerci
ordinary care that would be the measure of its duty and there wo
be no negligence, but if it failed to exercise ordinary care in so
as these particulars or any of them are concerned, that would c
stitute negligence. And, in making this inquiry you will take
the evidence in the case that will illustrate the question to y
mind—take the time, the place and occasion; decide whether th
were any clinkers or whether there were any crossties there
174 alleged, and take into consideration in passing on this qu
tion, gentlemen, the rules of the company that have been
troduced in evidence, and which will go out with you while you h
the case under consideration, and then, considering these rules,
time, the place, the circumstances and all the facts as disclosed
you by the evidence say for yourselves whether the defendant
negligent or not in so far as the particulars charged against it
concerned.

If it exercised ordinary care in so far as these particulars are c
cerned it would not be negligent; if it failed to do so, so far as th
particulars or any of them are concerned, that would constitute n
ligence.

"If this plaintiff, gentlemen, at the time as alleged by him, was engaged in making up, as car inspector, a train that was to go beyond the limits of the State, carry freight beyond the limits of the State of Georgia, he would have been engaged in interstate commerce. And if you believe he was so engaged and while so engaged there was a sudden emergency in connection with an injury to O'Berry—whose name is set forth in the petition, another employee—that in the discharge of his duty under the rules and instructions from one in authority he represented the company while in an effort to release O'Berry, and in a further effort to clear the track for the movement of cars that were to go into train 75 with its other cars, with
175 the present intention of returning immediately to the work in which he had just before been engaged, he would still, during that period, be engaged in interstate commerce and have the right to maintain this action and recover, if otherwise entitled to recover in the case."

Now, gentlemen, you will consider the case to this point and decide whether the defendant was negligent or not.

If you reach the conclusion the defendant was not negligent in any of the particulars charged against it, there could be no liability, and the defendant would not be responsible to the plaintiff, although he may have been injured, but if you believe there was such negligence and such negligence, if it existed, caused injury to the plaintiff, he would have the right to recover unless barred of the right of recovery by his own conduct.

The federal law, gentlemen, under which this suit is pending declares—The fact that the employee (and this plaintiff was an employee) may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee. And in this connection, gentlemen, the law put upon the plaintiff the duty of exercising ordinary care to protect himself—and ordinary care as applied to him has the same definition as already
176 given, that is just such care as every prudent man would exercise under the same or similar circumstances.

If he was guilty of negligence contributing to his injury, as stated, he would not be barred of his right of recovery, if otherwise entitled to recover, but the damages to be allowed him should be reduced in proportion to the degree of fault or negligence attributable to him. If he was injured and his own negligence was the cause of his injury he cannot recover. That is, if without negligence on the part of the defendant, he caused injury to himself by his own negligence, he cannot recover.

A contention of the defendant, gentlemen, is, that this occurrence, if you believe the plaintiff was not negligent, causing his own injury, was due to what the law recognizes as an unavoidable accident. It contends, in this connection, denying all the time that it is guilty of any negligence, it contends that if Mr. Puckett was injured at all by stumbling over some clinkers, that he must have stumbled over some clinkers that were used in the ballast for fixing

the railroad track, and that there was no negligence in having thos
things there, and that it was an accident incident to his employmen
The rule on that subject, gentlemen, is this: If he was injure
unmixed with negligence on the part of the defendant causing i
and not negligent himself causing it, that would constitute a
177 accident, that is, recognized by law as an unavoidable acciden
which may occur in any sort of business or calling.
To restate it, gentlemen, if you believe the defendant was no
negligent in considering the specifications charged against it, an
if you believe Mr. Puckett himself was not negligent, causing hi
own injury, that would be an accident for which nobody would b
liable and he could not recover against the defendant.
Now, these issues you will take and under the facts and the in
structions given you consider whether the plaintiff has the righ
to recover in this case or not. If you reach the conclusion that h
is not entitled to recover that would be an end of your investigation
and you would stop and return a verdict for the defendant.
On the other hand, if you reach the conclusion that he is en
titled to recover you would go to a consideration of the question o
damages to determine how much should be awarded in his favor
Damages, gentlemen, are given as compensation for the injury done
and generally this is the measure when the injury is of a characte
capable of being estimated in money. That is, when the law permi
damages to be recovered in this sort of cases, it seeks to give com
pensation, give fair pay for the injury done—and you should kee
this rule in mind in passing on all the classifications of damages sub
mitted to you—that is, what would be fair compensation for the in
jury done?
178 I have called your attention to his description of his in
juries. In passing on that question you will look to the evi
dence and from it ascertain how he was injured, if injured on thi
occasion the extent of it and all about it, deciding this question from
the evidence. The law being that if the defendant is liable to him a
all it is liable only for what its negligence caused, and not for any
thing that may have been due to any other cause, that is if the de
fendant was negligent.
The plaintiff claims that on account of his injuries he was con
fined to his bed, lost time from his work, and consequently lo
money. If the evidence shows you, gentlemen, that he did lose tim
how much time and how much money he lost on that account, wit
reasonable certainty, if he recovers in the case, he should recover th
sum.
In addition, he claims that he has suffered pain, mental and phy
ical, and will continue to do so as long as he lives.
This is a legitimate item upon which damages may be allowed
the plaintiff is entitled to recover, and if he sustained such damage
Your method of ascertaining the amount would be to determi
what sort of injuries he received, the extent of them, their charact
as to producing or not producing pain, the mildness or inte
179 sity of the pain, its probable duration, and then desiring to
fair and just to both parties, and not oppres-ive to the defen

ant, you would give to the plaintiff, on this specification of damages, if he recovers, such sum as you believe would be a fair compensation for his pain and suffering, mental and physical, if he endured such pain, the law declaring as to this class of damages there is no standard by which to measure it, except the enlightened consciences of impartial jurors. Further, the plaintiff alleges that on account of his injuries one leg is shortened and that this condition is permanent, and that it has impaired his capacity to labor and earn money in the future.

This is a legitimate item also upon which damages may be allowed if the plaintiff is entitled to recover and if the evidence shows you that he sustained such damages. Your first inquiry will be what sort of injury he had and whether such injury was caused by the negligence of the defendant, if there was such negligence, and whether it is permanent, that is, will continue as long as he lives. If you believe these propositions to be true, you would then go further gentlemen, and determine to what extent or degree his capacity to labor and earn money has been impaired, if at all. You would determine that by the evidence, ascertaining from it what he made heretofore, what he was capable of making, what business engaged
80 in, what capable of making in his calling, and then determine how much less he would make because of his injury per annum. That would give you the gross amount of his annual loss. You would then determine how long you think, in the course of nature, he would probably have lived, taking into consideration his age as of this date, his habits, prior health, conditions, surroundings, and manner of living, and determine how long you think he would probably have lived in the course of nature.

Then multiplying the amount that you believe would represent his annual loss by the number of years you believe he would have lived, would give you the gross amount on this specification.

But, in passing, gentlemen, on the question of what would be his annual loss or how much less he would earn annually, you would take into consideration the fact that old age itself as it comes on, reduces one's capacity to labor and earn money—take into consideration the fact that a man very rarely engages in work every day of his life—the uncertainty of business—the difficulty of obtaining and keeping steady employment, and after making due allowance for all such considerations fix on what sum you think would represent his annual loss for the balance of his life. And as I have stated to you, by multiplying the number of years you believe he would have lived by the amount you think would be his annual loss, that would
81 give you the gross sum on this specification, but since if he recovers in the case he has a right to have the money paid down to him cash, it would be your duty to reduce the gross sum to its present cash value, which would be a less sum, a considerably less sum than the gross sum.

This you can do by any method of correct calculation satisfactory to yourselves, basing your calculation, if you make one, on a 7% basis, that being the legal rate of interest in this state.

Certain tables have been put in evidence which you may use on

this branch of the case if you think right to do so, you are bound to use them, but may do so in passing on this specificat of damage. One of these tables is called a mortality table, the ot an annuity table.

The mortality table is designed to show the probable expecta of life in persons of average health and constitution, of given a That is all the information you can get from that table. It two sets of columns, one marked "Age," and opposite that marked "Expectation years." I will illustrate the proper use of table so if you do use it you will use it correctly.

Suppose you wanted to ascertain how long a person 25 years age of average health and constitution would probable live acc ing to this table. You would look in the "Age" column u
182 you find the figures 25, and then look in the "Expectat years" column, just opposite, and you will find the figu 37.86, which indicates 37 years and eighty-six one-hundredths year. But if you use the table to ascertain Mr. Puckett's expecta according to it, you would look in the "Age" column until you the figures representing his present age and then look in the " pectation years" column right opposite those figures, and you find figures representing years and fractions of a year, and the me ing of that would be that a person of Mr. Puckett's age, of aver health and constitution, would probably live, according to this ta the number of years and fractions of a year in the table set oppo the figures indicating his age. Now, whether those would repres the true expectancy of Mr. Puckett or not, you determine for yo selves, exercising your observation, experience, and good judgme and then either extend, reduce or accept the expectancy thus as tained, as you think right. But, when you have thus ascertai his expectancy you would still have to multiply that by the ann loss and then reduce the result to its present cash value, which wo require a calculation of some length, but this calculation, gen men, is provided for in the annuity table, which you can use you thing right, and you would reach a conclusion or result b much shorter process than you could reach it by a calculation m by yourselves.

183 This table, the annuity table has three sets of colum one marked "Age" and to the right of that one mar "Age" and to the right of that one marked "Six per cent" and still further to the right marked "Seven per cent." You will ign the six per cent column if you use the table and would use o the 7% table.

This table is designed to show the present cash value of an nuity of $1.00 in favor of persons of given ages. I will illustr the proper method of using this table, gentlemen. Suppose wanted to determine what would be the present cash value of annuity of $1.00 in favor of a person 25 years old. That is a de to be paid down to him annually as long as he lived. You w look in the "Age" column until you find the figures 25, and look opposite those figures to the right in the "7 per cent" colu and you would find the figures 11.972, indicating eleven dollars

nine hundred and seventy-two one thousandths of a dollar, and that means that an annuity of one dollar in favor of a person 25 years old will be worth cash paid down to him at once eleven dollars and nine hundred and seventy-two one thousandths of a dollar.

If you use this table in connection with this case you would look to the "Age" column until you find the figures representing Mr. Puckett's age and then look opposite those figures in the column marked "7 per cent" and you would find other figures repre-
184 senting dollars and fractions of a dollar. The meaning of that would be an annuity of one dollar in favor of a man of Mr. Puckett's age would be worth the amount expressed in the "7 per cent. column," opposite the figures representing his age. Now, that would be the present cash value of an annuity of $1.00 and then by taking the sum thus ascertained and multiplying it by the amount you think would represent Mr. Puckett's annual loss you would get the present cash value of the amount to be allowed to him on this specification of damages, according to this table, if he recovers in the case. But whether that would represent the amount he should actually receive on this specification, gentlemen, if he recovers, you would decide for yourselves, increasing, diminishing or accepting the amount thus ascertained, as you think right under all the evidence in the case.

If you find that the plaintiff is not entitled to recover, gentlemen, you would not be concerned with the instructions given you on the subject of damages, but if you believe he is entitled to recover you will consider the instructions given you on this subject and follow them in ascertaining and fixing the amount to be awarded in his favor.

If he recovers damages on more than one specification, you would not return a verdict for separate sums of money but adding the sums together, you would return a verdict for so many dollars, one
185 sum of money.

If you find for the plaintiff, the form of your verdict would be—We, the jury, find for the plaintiff, so many dollars.

If you find for the defendant, the form of your verdict would be—We, the jury, find for the defendant.

When you have agreed upon your verdict, let it be written upon the petition dated signed by your foreman and returned into court.

The foregoing charge is approved as correct and ordered filed as a part of the record in the above stated case.

This the 15th day of April, 1914.

H. M. REID,
Judge C. C. A.

Filed in office this the 23rd day of June, 1914. S. T. Conyers, Cl'k.

186 STATE OF GEORGIA,
County of Fulton:

I hereby certify, That the foregoing pages, hereunto attached, contain a true transcript of such parts of the record as are specified

in the bill of exceptions and required, by the order of the presi judge, to be sent to the Court of Appeals in the case of South Railway Company, plaintiff in error v. H. E. Puckett, defendan error. I was unable to send up this record in the time prescribe account of the volume of business in this office.

Witness my signature and the seal of court affixed this the day of July 1914.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court Fulton County, Georgia,
ex-Officio Clerk City Court of Atlant

187 [Endorsed:] Case No. 5885. Court of Appeals of Geo October Term, 1914. Southern Ry. Co. versus Puc Transcript of Record. Filed in office Jul- 15, 1914. W. E. Ta D. C. C. A. Ga.

188 Court of Appeals of Georgia.

5885.

SOUTHERN RAILWAY COMPANY
v.
PUCKETT.

By the COURT:

1. Since the passage by Congress of the amendment of 1910 (April 5, 1910) to the act of April 22, 1908, generally known as "Federal employers' liability act," a suit brought in a State c by any person who has a cause of action under this act, can not any reason be removed to the United States Courts. Strause Chicago Ry. Co., 193 Fed. 293; Symonds v. St. Louis R. Co., Fed. 353; Ullrich v. New York R. Co., 193 Fed. 768; Kansas R. Co. v. Cook (140 S. W. 579); Lee v. Toledo, St. L. & S. W Co., 193 Fed. 685; McChesney v. Ill. Cent. R. Co., 197 Fed. Hulac v. Chicago & N. W. R. Co., 194 Fed. 747.

2. The court did not err in allowing over the defendant's ob tions, the amendment to the petition.

3. The petition as finally amended set forth a cause of ac under the Federal employers' liability act; and the demur thereto, both general and special, were properly overruled.

4. The admission of certain printed rules of the defendant c pany was not error.

5. Under repeated rulings of this court and of the Supreme Co an assignment of error upon the ground that the court erre refusing to grant a nonsuit will not be considered, when
189 case proceeds to a verdict, and exception is taken to the fusal to grant a new trial on the ground that the ver was not supported by evidence.

6. The instructions complained of contained no error requi the grant of a new trial.

7. The failure to give certain instructions to the jury, in absence of timely written requests therefor, was not error.

8. Under the pleadings and the evidence, the jury were authorized to find that the plaintiff's injury was caused by the negligence of the defendant company, and that this negligence was also the negligence of one or more of the three individual agents of the company against whom negligence was alleged in the petition.

9. Under the facts of this case, both the defendant company and the plaintiff, at the time of the infliction of the injury sued for, were engaged in interstate commerce, within the meaning of the Federal employers' liability act.

10. The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

190 BROYLES, *J.*:

H. E. Puckett sued the Southern Railway Company for damages, based on injuries alleged to have been sustained by him in August, 1911, while at work for the defendant company in its Atlanta yard, as car-inspector. On the night of the alleged injuries and prior thereto he had been engaged in inspecting cars which had been put into a- interstate train, to wit, train No. 75, which ran between Atlanta, Georgia, and Birmingham, Alabama. At the time he was injured he had inspected some 23 to 25 cars in this train, and there remained to be inspected 12 or 14 cars which were to be placed in the same train. While waiting for these remaining cars to be placed in the train, and while making the entries and necessary data of the inspection of the cars in his inspection book, a collision between other cars of the defendant occurred in the yard near-by and several tracks of the defendant were thereby obstructed and blocked by the wreckage. An employee of the defendant, one O'Berry, was caught in the collision and pinned beneath a car and the engine. In obedience to the printed rules of the company the plaintiff immediately went to the scene of the wreck, to render what assistance he could, and was there instructed by an employee of the company, superior to him in authority, to go and get a "jack" to assist in raising the wrecked car, so as to extricate O'Berry and clear the tracks of the wreck.

191 The remaining cars which had not been placed in train No. 75 were to have been transported over some of the tracks obstructed by the wreck, and on account of these tracks being so obstructed it became necessary to detour these cars for some distance over other tracks; and thereby train No. 75 was delayed about an hour. While the plaintiff was assisting in clearing up the wreck, and while carrying blocks on his shoulder for the purpose of "jacking up" the wrecked car and replacing it on the track, so that O'Berry could be released and the tracks freed from their obstruction, he stumbled over three large clinkers, about six or eight inches in diameter, on the roadway near the track, which started him falling, and in stumbling he struck his foot against two old crossties overgrown with grass, which were on the roadway near one of the tracks, about five feet from the clinkers, and fell and was seriously and permanently injured.

The 8th and 9th headnotes alone need elaboration. It is earnestly argued by learned counsel for plaintiff in error that the evidence

in this case did not show any actionable negligence by the rail
company. The allegations of negligence in the petition were,
that three large clinkers were on the roadbed, (2) that two old c
ties, overgrown with grass, were lying alongside and near the t
and (3) that grass had grown upon the roadbed. It is the dut
the master to furnish his servant with a safe place in which to w
and he is charged with the exercise of ordinary care in
192 selection and maintenance of such a place. Counsel cites
case of Lee v. Central Railroad, 86 Ga. 231, where it was
that the presence of one clinker of unusual size on the margin
railway track, where switching is done, and upon which a brake
accident-ly steps in descending from a moving engine, will not re
the company liable for a personal injury which the brakeman
tained. In Georgia Railroad v. Hunter, 9 Ga. App. 384, it was
that the railroad was negligent in having a pile of clinkers nea
railroad track. The ruling in Zipperer v. Seaboard Air Line
way, 129 Ga. 387, is not in conflict with the holding in the Hu
case, or with our holding in the instant case. There the defend
a track-hand, while walking along the side of the railroad t
struck his foot against a steel rail which lay in his path, and wa
jured, and the court held that he could not recover, for the
son that the presence of the rail was not negligence on the pa
the railroad company. In that case there was no allegation th
was not necessary for the railroad company to have the steel
where it was, or that it was placed there in an improper man
Moreover, in that case the rail was placed on the roadbed, near
defendant's track, and was in full view of every passer-by; it was
overgrown with and concealed by grass, as were the cross-tie
the case at bar. We are not disposed to extend the ru
193 of the Supreme Court in the Lee case, supra, so as to
that, as a matter of law, the presence of three or more l
clinkers near a track, in a railroad yard, is not negligence on
part of the railroad company. In our opinion, under the circ
stances of the instant case, it was for the jury to say whether or
the presence of these large clinkers in its yard and near its tracks
negligence. We think, also, that it was for the jury to say whe
or not the presence of the cross-ties over which the plaintiff fell,
the presence of the grass on the roadway of the defendant comp
was negligence. As to the cross-ties and grass, the rules of the def
ant, as introduced in evidence, specifically provide that old c
ties be burned and not left near the tracks, and that the grass
be kept cut along the roadbed. In our opinion, it was also for
jury to say what was the proximate cause of the plaintiff's injur
whether it was the clinkers, over which he first stumbled, or
cross-ties, upon which he next stumbled and fell. While he t
fied that the clinkers started him falling, he distinctly swore
that if it had not been for the cross-ties he would not have fallen
The petition alleges that certain individual agents of the def
ant company, to wit, R. L. Cowan, Samuel Smith and J. N. Bi
were guilty of the negligence that caused plaintiff's inj
194 The defendant introduced in evidence a printed rule of
company, addressed to yardmasters, which required its y

master to keep the yards of the railroad clear of all obstructions, and it is insisted that if any particular agent of the defendant was negligent in this case, it was the yardmaster, against whom no negligence was alleged in the petition. The evidence showed that R. L. Cowan was track foreman, Samuel Smith, track supervisor, and J. N. Biddy, roadmaster, for the defendant. The company's rules introduced in evidence, however, addressed to track-supervisors and track-foreman, require them also to see that there are no obstructions on or near the railroad tracks, and require that grass and weeds shall be cut, that brush, weeds, worn out ties, timber, and other rubbish shall be collected and promptly burned, and that they shall not allow lumber, ties, rails, or other material to be placed within ten feet of the main-track or within seven feet of any side-track. It is insisted by the plaintiff in error that these rules addressed to track supervisors and foreman refer only to their duties upon the main line of the road and sidings between terminals, and not to the terminal yards of the company. These three named agents of the company, however, testified during the trial for the defendant company, and none of them swore that such rules referred only to the main track of the railroad and to sidings, and not to the tracks and road-beds in the
195 terminal yard; and there was testimony both for the plaintiff and the defendant that it was the duty of these particular agents of the defendant to discover and to remove all dangerous obstructions, including old cross-ties, in this railroad yard where the plaintiff's injury occurred, and that the duty to dispose of old cross-ties there was not the duty of the yardmaster. The evidence showed that the cross-ties upon which the plaintiff fell were within seven feet of one of the tracks of the defendant company, in violation of the defendant's printed rules duly introduced in evidence. So, in our opinion, under the pleadings and the evidence, the jury were authorized to find that the plaintiff's injury was caused by the negligence of the three individual employees of the company named in the petition, and that the defendant company was responsible for this negligence.

There is no contention in this case that at the time the plaintiff was injured the railroad Company was not engaged in interstate commence; the sole contention on that point being that the plaintiff was not so engaged. It is not denied that while the plaintiff was inspecting the cars in the interstate train, and while he was making entries of that inspection in his car inspection book, he was engaged in interstate commerce, but the contention of learned counsel for the plaintiff in error is that, when the collision between the other cars occurred, and when the plaintiff went to the wreck, to assist in jacking up the train to release O'Berry, he was
196 not then so engaged. We can not agree with this contention. The plaintiff had not completed his work of inspecting the interstate cars, and while so engaged a sudden emergency, caused by the wreck, arose, and, in obedience to the rules of the company, he hastened to the scene of the wreck to render assistance, and was then expressly instructed by an employee of the company, superior to him in authority, to assist in "jacking up" the wrecked car; and

we think that when so engaged, under the ruling of the Supreme Court of the United States in North Carolina Railroad Co. v. Zachary, 232 U. S. 248 (58 L. ed. 591), he was still engaged in interstate commerce. In the Zachary case, where a fireman left an interstate train, after inspecting, oiling, firing, and preparing his engine for the trip, and while crossing a railroad track in the yard of the defendant company for the purpose of going to his boarding house on a personal errand, he was injured, the United States Supreme Court held that he was still engaged in interstate commerce. In that decision the court said: "He had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty' and employed in commerce notwithstanding his temporary absence from the locomotive engine."

197 It is insisted that the intention of the plaintiff, at the time of his injury, in "jacking up" the wrecked car, was to release O'Berry from his perilous position, and not to free the tracks from the obstruction so that the remaining cars to be placed in train No. 75 could be transported over the obstructed tracks. We think it immaterial that the primary object of the plaintiff may have been the rescue of his fellow employee, O'Berry. If the plaintiff helped to "jack up" the wrecked car and engine, though primarily done for the purpose of releasing O'Berry, it was nevertheless the first step taken in clearing the obstruction from the tracks so that over these tracks could be transported the remaining cars to be placed in train No. 75. In our opinion his work facilitated the interstate commerce of the railroad, and, consequently, he was engaged in interstate commerce when injured. It is immaterial that the tracks were not cleared in time for the remaining cars (that went into train 75) to be switched over them, and that these cars were detoured over other tracks.

In Pederson v. Delaware, L. & W. R. Co., 229 U. S. 146 (57 L. ed. 1125), the defendant was operating a railroad for the transportation of passengers and freight in interstate and intrastate commerce, and the plaintiff was an ironworker employed by the defendant

198 to repair its bridges and tracks. At the time of his injury he and another employee, under the direction of their foreman, were carrying from a tool-car to a bridge some bolts which were to be used by them in repairing the bridge; the repairing to consist in taking out a girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge. Both of these bridges were being used regularly both in interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts over the temporary bridge, on his way to the bridge he was to repair, he was run down and injured by an intrastate train. On this statement of facts the Supreme Court of the United States (three of the Justices dissenting) held that the plaintiff was engaged in interstate commerce at the time of his injury, and entitled to the benefit of the

Federal act. And the majority of the court said: "Tracks and bridges are as indispensable to interstate commerce as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad may be separated into its several elements, and the nature of each determined regardless of its relation to the others or to the business as a whole. But this is an erroneous assumption; the true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" And again in that case the court says: "True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair, or in keeping it in suitable condition for use, from being an employment in interstate commerce." The court in that case, answering the contention that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where work was to be done some of the materials to be used therein, said: "We think there is no merit in this. It was necessary to the repair to the bridge that the materials be at hand; the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the round-house to the track on which are the cars he is to haul in interstate commerce."

In view of the decision in the Pederson case, supra, the decision of the circuit court of the northern district of Georgia in Taylor v. Southern Railway Co., 178 Fed. 380 (in which it was held that a member of a railroad bridge-gang, whose duties required repair of bridges in different cities, and who, while engaged within the scope of his employment in repairing a bridge on the defendant company's line, was injured by an alleged defective scaffold, was not employed in interstate commerce) was erroneous.

We think that under the ruling in the Pederson case, the plaintiff in the instant case, when he was engaged in helping to remove obstructions from the railroad-tracks of the defendant company, where these tracks were being constantly used to transport cars in both interstate and intrastate commerce, was clearly engaged in interstate commerce. The tracks obstructed by the wreck were "instrumentali-

ties" used indiscriminately for both interstate and intrast
201 commerce. In other words, cars going into both interst
and intrastate trains were constantly switched and transpor
over these identical tracks; and when these tracks became obstruct
the clearing of the obstruction certainly facilitated both the int
state and intrastate commerce of the railroad. In railroad ya
both "lead" and "switch" tracks are indispensible to interstate co
merce. Such tracks are just as important to carry on the business
the railroad as are the main tracks, or tracks outside of the ya
These yard-tracks are necessary in making up trains and in swit
ing, and in classifying and distributing the different cars that ma
up the completed interstate or intrastate train.

See also, in this connection, Central Railroad v. Colarsurdo, 1
Fed. 901. The case of Ill. Cent. R. Co. v. Behrens, 233 U. S. 47
cited by counsel for plaintiff in error, does not control the insta
case as contended. The decision in that case holds only that t
plaintiff at the time of his injury must be engaged in interstate co
merce.

Judgment affirmed.

202 Court of Appeals of the State of Georgia.

ATLANTA, July 2, 1915.

The Honorable Court of Appeals met pursuant to adjournme
The following judgment was rendered:

SOUTHERN RY. CO.
v.
H. E. PUCKETT.

This case came before this court upon a writ of error from the ci
court of Atlanta; and, after argument had, it is considered and
judged that the judgment of the court below be affirmed.

Bill of costs, $10.00.

203 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable t
Judges of the Court of Appeals of the State of Georgia, Greetin

[Seal U. S. District Court, N. D. Georgia.]

Because in the record and proceedings, as also in the rendition
the judgment of a plea which is in the said Court of Appeals bef
you, or some of you, being the highest court of law or equity of t
said State in which a decision could be had in the said suit betwe
The Southern Railway Company, plaintiff in error, and H.
Puckett, defendant in error, wherein was drawn in question the
lidity of a treaty or statute of, or an authority exercised under,
United States, and the decision was against their validity; or wher
was drawn in question the validity of a statute of, or an author

exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution,
204 or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventh day of July, in the year of our Lord one thousand nine hundred and fifteen.

OLIN C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Allowed by

RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals
of the State of Georgia.

Filed in office, July 7, 1915. Logan Bleckley, Clerk, Court of Appeals of Georgia.

205 UNITED STATES OF AMERICA, *ss:*

To H. E. Puckett, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Court of Appeals of the State of Georgia, wherein the Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard B. Russell, Chief Judge of the

Court of Appeals of the State of Georgia, this seventh day of J
in the year of our Lord one thousand nine hundred and fifteen.

RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals
of the State of Georgi

206 [Endorsement.]

On this 7th day of July, in the year of our Lord one thous
nine hundred and fifteen, personally appeared E. R. Black before
the subscriber, and makes oath that he delivered a true copy of
within citation to Atkinson and Born, attorneys for H. E. Puck
Defendant in Error.

E. R. BLACK

Sworn to and subscribed the 7th day of July, A. D. 1915.

[Seal Court of Appeals of the State of Georgia, 1906.]

W. E. TALLEY,
Deputy Clerk Court of Appeals of Georgi

Filed in office, July 7, 1915. Logan Bleckley, Clerk Court of
peals of Georgia.

Due and legal service of the within citation acknowledged,
copy thereof received. All other and further service and n
waived.
This July 7th, 1915.

ATKINSON & BORN,
Attorneys for H. E. Puckett, Defendant in Erro

207 SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
H. E. PUCKETT, Defendant in Error.

Acknowledgment.

Due and legal service of the citation, petition for writ of e
assignment of errors, and all other proceedings connected with
writ of error from the Supreme Court of the United States to
Court of Appeals of Georgia in the above case acknowledged.
other and further service waived.
This July 7th, 1915.

ATKINSON & BORN,
Attorneys for Defendant in Erro

Filed in office July 7, 1915. Logan Bleckley, Clerk Court of
peals of Georgia.

208 In the Court of Appeals of Georgia.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
v.
H. E. PUCKETT, Defendant in Error.

Petition for Writ of Error.

Southern Railway Company, the above named plaintiff in error, respectfully shows that on the 2nd day of July, in the year 1915, the Court of Appeals of the State of Georgia, which is the highest court in said State in which a decision in which the action referred to herein could be had, rendered a judgment against your petitioner in a certain action, originally brought in the city court of Atlanta, in which H. E. Puckett was plaintiff, and your petitioner Southern Railway Company, was defendant.

In said action certain rights, privileges and immunities were duly and specially set up and claimed by your petitioner under the Constitution and under the statutes of the United States, and the decision of the said Court of Appeals was against the rights, privileges and immunities so set up and claimed, all of which will more fully and in more detail appear from the assignment of errors filed herein and herewith.

209 Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Court of Appeals of Georgia in rendering judgment against it in this action, it respectfully prays that a writ of error may issue from the Supreme Court of the United States to the Court of Appeals of Georgia for the correcting of the errors complained of; that an order may be entered fixing the amount of a supersedeas bond herein; that a duly authenticated transcript of the record and proceedings herein in said Court of Appeals of Georgia may be sent to the Supreme Court of the United States, and that the decision and judgment of said Court of Appeals herein may be reversed and annulled.

This July 7th, 1915.

McDANIEL & BLACK,
Attorneys for Southern Railway Co.

In the Court of Appeals, State of Georgia.

Let the writ of error above prayed for issue upon the execution of bond by Southern Railway Company, payable to H. E. Puckett, his heirs, executors, administrators and assigns, in the sum of Ten Thousand Dollars; such bond, when approved, to act as a supersedeas.

This July 7th, 1915.

RICHARD B. RUSSELL,
Chief Judge Court of Appeals of Georgia.

Filed in office, July 7, 1915. Logan Bleckley, Clerk Court of Appeals of Georgia.

210 In the Court of Appeals of Georgia.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
v.
H. E. PUCKETT, Defendant in Error.

Assignment of Errors for the Supreme Court of the United Sta

This was a civil action instituted by the plaintiff, H. E. Puck against Southern Railway Company, defendant, in the city co of Atlanta to recover damages alleged to have been sustained said Puckett in the service of Southern Railway Company as a inspector in its yards at Atlanta, Georgia, on the 26th day of Aug 1911.

The suit as originally brought was projected in two counts—o against the Railway Company and certain individuals as co-defe ants; while the second count set up that said Puckett at the ti of his injuries was engaged in interstate commerce and that t Railway Company was also at the time engaged in interstate co merce, thus seeking to make applicable the Act of Congress proved April 22nd, 1908, the same being "An Act Relating to ability of Common Carriers by railroads to their Employees in C tain Cases," which, as amended by the Act of Congress approv April 5th, 1910, is generally known as "The Federal Employe Liability Act."

211 A petition and bond for the removal of the case to t appropriate Federal Court was filed within the time requir by statute by Southern Railway Company in the city court of A lanta, it being set up in the petition for removal that a separab controversy existed between it, a corporation created under the la of the State of Virginia and a citizen of said State, and H. E. Pucke a citizen of the State of Georgia and the Northern District thereof.

The removal of the case was urged upon the ground of diversi of citizenship. The petition therefor was denied by the Judge the city court of Atlanta.

The suit, when tried, was finally based solely upon the Feder Employers' Liability Act, the count of the petition based upon t State law having been stricken by amendment and the individua who were originally joined as co-defendants with the Railway Co pany having also been stricken from the action.

After a verdict and judgment against it, Southern Railway Co pany sued out a bill of exceptions, which, being properly certifi operated as a writ of error to carry the case to the Court of Appe the judgment of the lower court having been affirmed by said Co of Appeals on July 2nd, 1915.

212 Southern Railway Company, plaintiff in error in t Georgia Court of Appeals and plaintiff in error in the S preme Court of the United States, respectfully assigns as errors the record and in the proceedings in this cause in the Court of A peals of Georgia the following:

1. The Court of Appeals of Georgia erred in holding that the suit was not removable to the then Circuit Court of the United States for the Northern District of Georgia, and in holding that plaintiff in error's petition for removal was properly denied, since under the statutes of the United States providing for the removal of causes from the State to federal courts, Southern Railway Company was entitled and privileged to have said suit which was of a civil nature at law and which contained a controversy wholly between citizens of different States (said Southern Railway Company, a citizen of the State of Virginia, and H. E. Puckett, a citizen of the State of Georgia and of the Northern District thereof) removed to the then Circuit Court of the United States for the Northern District of Georgia, the District in which said suit was brought; the decision of said Court of Appeals that it was not entitled to remove the cause has deprived Southern Railway Company of the right, privilege and immunity granted it by Section Two of the Act of Congress of March 3rd, 1875, as amended by the Act of March 3rd, 1887 and Act of
213 August 13th, 1888, which Acts in question were passed by the Congress of the United States by virtue of the power and authority vested in it by Article 3, Section 1 and Clause 1, and Section 2, Clause 1 of the Constitution of the United States.

2. (*a*) Said Court erred in holding that said H. E. Puckett was at the time of the sustaining of the alleged injuries for which he sued engaged in interstate commerce, since the evidence shows to the contrary; that is to say, that he was not engaged in interstate commerce at the time of such alleged injuries.

(*b*) Said court erred in holding that H. E. Puckett was entitled to maintain his action under the Act of Congress of April 22nd, 1908, as amended on April 5th, 1910, the same being, "An Act relating to Liability of Common Carriers by Railroads to their Employees in Certain Cases," generally known as "The Federal Employers' Liability Act."

The work upon which H. E. Puckett was engaged at the time of his said alleged injuries had no such connection with interstate commerce as would cause said Puckett to have been employed in such commerce so as to entitle him to sue under the Act of Congress above referred to, known as "The Federal Employers' Liability Act."

(*c*) Because said Court of Appeals erred in holding that the trial court did not err but correctly charged the jury in the following instruction:
214

"If this plaintiff, gentlemen, at the time as alleged by him was engaged in making up, as car inspector, a train that was to go beyond the limits of the State and carry freight beyond the limits of the State of Georgia, he would have been engaged in interstate commerce. And if you believe he was so engaged and while so engaged there was a sudden emergency in connection with an injury to O'Berry (whose name is set forth in the petition—another employee) that in the discharge of his duty under the rules and instructions from one in authority he represented the Company while in an effort to release O'Berry and in a further effort to clear the track for the movement of cars that were to go into

Train 75 with its other cars, with the present intention of r
turning immediately to the work in which he had just before be
engaged, he would still, during that period, be engaged in intersta
commerce and have the right to maintain this action and recover,
otherwise entitled to recover in the case."

Such instruction was erroneous in that the fact that Puckett m
have been engaged in interstate commerce prior to the time wh
he undertook to release the employee, O'Berry, coupled with t
fact that he intended later to resume his duties in connecti
with interstate commerce, would not be the test as to the cha
215 acter of his engagement at the time of his injury, but, on t
contrary, the immediate work upon which he was engag
would determine the question; and also because the court erroneous
assumed in such instruction that he was engaged in a further effort
clear the track for the movement of cars that were to go into Tra
75, an interstate train, the evidence showing that the cars went in
Train 75 over other tracks, and that this train had left upon
journey before O'Berry was released from between the car and engi
and before the track upon which the collision in which he w
pinioned took place had been cleared.

On account of the errors assigned in the above sub-divisio
"*a*," "*b*" and "*c*," Southern Railway Company was deprived of
right, privilege and immunity which it possessed and to which it w
entitled under the Act of Congress of April 22nd, 1908, as amend
on April 5th, 1910, above referred to, which Act and Amendme
were passed by the Congress of the United States under the power a
authority derived by it under Article 1, Section 8 and Clause 3 of t
Constitution of the United States. The construction of the Statu
of the United States above referred to, as insisted upon by plaint
in error and denied by said Court of Appeals, would have led to
judgment in its favor.

3. Said Court of Appeals of Georgia erred in holding th
216 H. E. Puckett, by his original petition and the amendmen
thereto, made and set forth a cause of action under the Act
Congress of April 22nd, 1908, as amended by Act of April 5th, 191

4. Because said Court erred in holding that a case was made und
the federal statute in question by the evidence, since the neg
gence charged and imputed to Southern Railway Company on
count of the acts of certain individuals was not proved, and therefo
erred in holding that a verdict could be legally found and a recove
had in favor of said Puckett against said Southern Railway Compa
under the federal statute upon which said case was finally tri

5. Said Court of Appeals erred in affirming the judgment of t
lower court and erred in rendering final judgment against it for t
reasons hereinbefore assigned.

Wherefore, for these and other manifest errors appearing in t
record, said Southern Railway Company, plaintiff in error, prays th
the judgment of said Court of Appeals of Georgia be reversed,
aside and held for naught, and that judgment be rendered for pla
tiff in error, Southern Railway Company, granting its rights und

he Constitution and statutes of the United States; and plaintiff in
rror also prays a judgment for its costs.

This July 7th, 1915.

217 McDANIEL AND BLACK,
Attorneys for Southern Railway Company.

Filed in office, July 7, 1915. Logan Bleckley, Clerk Court of Appeals of Georgia.

218 In the Court of Appeals of Georgia.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
v.
H. E. PUCKETT, Defendant in Error.

Supersedeas Bond.

Know all men by these presents, that we, Southern Railway Company, a corporation of the State of Virginia, as principal, and National Surety Company, a corporation of the State of New York, are held and firmly bound unto H. E. Puckett, his heirs, executors, administrators and assigns, in the full and just sum of Ten Thousand Dollars, for the payment of which well and truly to be made we hereby jointly and severally bind ourselves and our respective successors firmly by these presents.

Whereas, lately at a hearing before the Court of Appeals of Georgia, in a suit depending in said court between the said H. E. Puckett and said Southern Railway Company a final judgment was rendered against said Southern Railway Company, and Southern Railway Company seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment;

Now, therefore, the condition of this obligation is such that if the said Southern Railway Company, as plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs and
219 damages that may be adjudged against it if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof the said Southern Railway Company, as principal and National Surety Company, as security, have hereunto set their hands and seals this seventh day of July, in the year of Our Lord One Thousand, Nine Hundred and Fifteen.

SOUTHERN RAILWAY COMPANY, [SEAL.]
By E. R. BLACK, *Its Attorney at Law.*
NATIONAL SURETY COMPANY, [SEAL.]
By T. J. PEEPLES, *Resident Vice-President.*

[Corporate Seal.]

Attest:
BOYD PERRY, [SEAL.]
Resident Ass't Secretary.

The foregoing bond is hereby approved and it is ordered that t same operate as a supersedeas.

RICHARD B. RUSSELL,
Chief Judge of the Court of Appeals of Georgia.

Filed in office, July 7, 1915. Logan Bleckley, Clerk Court of A peals of Georgia.

220 In the Court of Appeals of Georgia.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
v.
H. E. PUCKETT, Defendant in Error.

Præcipe.

To the Clerk of the Court of Appeals of the State of Georgia:

The above named plaintiff — error hereby directs you to forwa to the Supreme Court of the United States with the writ of error t following parts of the record in this case:

(1st) The bill of exceptions;

(2nd) The transcript of the record in the Court of Appeals of t State of Georgia from the city court of Atlanta;

(3rd) The judgment and opinion of the Court of Appeals of t State of Georgia;

(4th) The original writ of error and citation based thereon;

(5th) Copies of the petition for the writ of error, the order allo ing the writ of error, the bond, the assignment of errors and of th præcipe.

This 7th day of July, 1915.

221 McDANIEL AND BLACK,
Counsel for Plaintiff in Error.

Service of the above præcipe is hereby acknowledged. Co thereof received and all other and further notice and service waived. We hereby agree that the record specified in the foregoi præcipe is all that is necessary to a clear understanding of the erro complained of.

This July 7th, 1915.

ATKINSON AND BORN,
Counsel for Defendant in Error.

Filed in office, July 7, 1915. Logan Bleckley, Clerk, Court Appeals of Georgia.

222 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, August 3, 1915.

I hereby certify that the foregoing pages hereto attached cont the original writ of error, citation, and acknowledgment of serv

together with a true and complete transcript of those parts of the record in the case of Southern Railway Co. v. H. E. Puckett which are required by the præcipe of the plaintiff in error to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

Witness my signature and the seal of the Court of Appeals of Georgia hereto affixed, the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY, *Clerk.*

223 In the Supreme Court of the United States on Writ of Error to the Court of Appeals of the State of Georgia.

No. 598, October Term, 1915.

SOUTHERN RAILWAY COMPANY
vs.
H. E. PUCKETT.

Whereas, in the transcript of the record in the above case now of file in the Supreme Court of the United States there is a printed book of railroad rules, and it being unnecessary that the same shall be reprinted; it is herewith stipulated and agreed by and between counsel for plaintiff in error and defendant in error that the Clerk of the Court may omit to print said book of railroad rules of plaintiff in error with the balance of the record.

EUGENE R. BLACK,
Counsel for Southern Railway Company, Plaintiff in Error.
EDGAR WATKINS,
Counsel for H. E. Puckett, Defendant in Error.

224 [Endorsed:] File No. 24,881. Supreme Court U. S., October Term, 1915. Term No. 598. Southern Railway Co., Plaff in Error, vs. H. E. Puckett. Stipulation to Omit Parts of Record in Printing. Filed December 9, 1915.

Endorsed on cover: File No. 24,881. Georgia Court of Appeals. Term No. 598. Southern Railway Company, plaintiff in error, vs. H. E. Puckett. Filed August 16th, 1915. File No. 24,881.

SUPREME COURT, U.S.
FILED
DEC 11 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. E. PUCKETT,
Defendant in Error.

No. 219
October Term,
1916.

BRIEF FOR PLAINTIFF IN ERROR

L. E. JEFFRIES,
E. R. BLACK,
SANDERS McDANIEL,
Attorneys for Plaintiff in Error.

JOHNSON-DALLIS CO., PRINTERS, ATLANTA

In The Supreme Court of The United States

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
H. E. PUCKETT,
Defendant in Error.

No. 219
October Term, 1916

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT.

Puckett brought an action for damages against Southern Railway Company based on injuries alleged to have been sustained by him in August, 1911, while at work for the Railway Company in its Atlanta yard as car inspector.

The suit was projected in two counts and joined with the Railway Company were certain individuals, to-wit: R. L. Cowan, Samuel Smith and J. N. Biddy, as co-defendants.

These individual defendants were alleged to hold certain positions in the Roadway Department of the Railway Company.

The first count contained in the petition as originally drawn and filed was based upon the assertion of rights and

complaint of injuries under Georgia laws, and the remedies sought by the plaintiff in this count were those conferred by State statutes, or existing at common law in this State.

The second count, however, set up that Puckett, at the time of his injuries, was engaged in interstate commerce and that the Railway Company was also engaged therein, so as to make applicable the Act of Congress approved April 26th, 1908, the same being, "An Act relating to liability of common carriers by railroads to their employees in certain cases," which, as amended by the Act of Congress approved April 5th, 1910, is generally known as "The Federal Employer's Liability Act," to this count.

Before the arrival of the time for pleading on the part of Southern Railway Company, it presented a petition and bond for the removal of the case to the then Circuit Court of the United States for the Northern District of Georgia.

The petition for removal set up diversity of citizenship insofar as the Railway Company and Puckett were concerned, and further set up that a separable controversy existed between the petitioner for removal and Puckett in that the second count of his petition was based upon the Federal Employer's Liability Act, and inasmuch as no cause of action was set out against Cowan, Smith and Biddy under the Federal Act in question, the controversy made by the second count of the declaration was solely between Puckett and Southern Railway Company.

The application for removal of the case was denied by the Judge of the City Court; exceptions pendente lite were filed by Southern Railway Company, and the alleged error

consequent upon the unfavorable action of the court with regard to the petition for removal was preserved in the record.

It is unnecessary to recite in detail the course which the case took as a result of the demurrers filed by the defendants in the lower court; but it is sufficient to state that the suit was finally recast, the first count having been stricken, the individual defendants having been dismissed from the action and the case being left to proceed upon the second count with Southern Railway Company alone as defendant.

Various amendments were filed by the plaintiff and by defendant and the case finally came to jury trial upon certain issues.

Puckett contended that on the night of his alleged injuries and prior thereto he had been engaged in the line of his duties in inspecting cars which had been put into a certain interstate train, to-wit,—train Number 75, which ran between Atlanta, Georgia, and Birmingham, Alabama; that at a particular juncture an employee of the Railway Company, to-wit,—one O'Berry, was caught in a collision between an engine and one of certain cars, with the result that he was pinned between a box car and the sill of the engine; that it became necessary to release O'Berry, and in order to do this, the car against which he was fastened had to be "jacked" up.

Puckett claims that an employee of the Company ordered him to get certain blocks to be used in "jacking" up the car; that this errand required him to go to another por-

tion of the yards where the blocks were found, and that on returning he stumbled upon a certain clinker near to a particular track, No. 27; that this started him to falling and in stumbling his foot struck an old cross-tie; that he was caused to fall, and the blocks struck certain portions of his back and hips, causing permanent injuries.

The negligence charged was in leaving the clinker over which he stumbled on the road-bed and in leaving the old cross-tie over which he fell abutting upon the pathway near to the track and in allowing grass to grow on the road-bed.

Although Cowan, Smith and Biddy were stricken from the suit as co-defendants with the Railway Company, at the same time the sole negligence charged against the Railway Company was through the imputation to it of the acts of omission and neglect of these three individuals.

Southern Railway Company, by denials in its answer, made issues with the plaintiff upon all the charges of negligence contained in the original petition and in all amendments thereto.

One of the conspicuous issues in the case was as to whether or not Puckett was engaged in interstate commerce at the time of his alleged injuries, so that the Federal Employer's Liability Act might apply, supersede the State law, and furnish the basis for his action.

Puckett originally advanced the contention that a number of cars collided with the engine, causing O'Berry to be in peril, (not only because he was caught, but for the further reason that the car which pinned him was on fire) that such cars were to be put into train 75 which was an

interstate train and that it was his duty to assist in releasing O'Berry as well as to clear the track to further the movement of these cars which were to go into the interstate train No. 75, thereby facilitating interstate commerce.

The evidence developed, however, that no cars that were attached to O'Berry's engine or in any way involved in the collision were to go into train 75; that there were only two cars in collision with the engine; that one of them was at this particular juncture loaded wi h intrastate commerce, and that the other was unloaded and was being hauled in the yard to be dropped on an "empty track" without any certainty as to its future loading.

We think that we can state with accuracy that plaintiff's counsel did not really insist upon the trial that the further movement of the two cars which were concerned in the collision with the engine furnished any basis for the claim that Puckett was engaged in interstate commerce.

The further contentions, however, were urged that he was engaged in interstate commerce for two reasons:

(1) Because it was necessary to release O'Berry and move the cars which collided with the engine in order that the track upon which the collision occurred might be used in placing the other cars which were to make up train No. 75.

(2) That inasmuch as Puckett was engaged in interstate commerce, (the inspection of certain cars that had gone into train No. 75) immediately before he went for the blocks to be used in jacking up the cars in an effort

to release O'Berry, and inasmuch as he intended to resume work which would cause him to engage in interstate commerce, (the inspection of other cars which were to go into train No. 75) therefore, during the interval in which he was aiding in the release of O'Berry he was engaged in interstate commerce.

Puckett secured a jury verdict upon the trial of the case and plaintiff in error filed a motion for new trial which was over-ruled. It then sued out a writ of error to the Court of Appeals of Georgia, seeking to review in that appellate court the errors assigned upon the trial of the case and preserved by exceptions pendente lite, as well as the errors which it asserted had been committed by the trial Judge when its motion for new trial was over-ruled.

The Court of Appeals affirmed the judgment of the lower court (See *Southern Railway Company vs. Puckett*, 16 Ga. App. Rep. 551; 85 S. E. 809; Printed Record, pages 82 and 88, inclusive.)

A writ of error from this Court to the Court of Appeals of the State of Georgia was then sued out and the case is now pending here upon such writ of error.

SPECIFICATIONS OF ERROR.

Among the errors assigned and filed with the petition for writ of error from this Court to the State Appellate Court was one based upon the denial of the application made by Southern Railway Company to remove the case from the State Court to the United States Circuit Court for the Northern District of Georgia, (the Circuit Court at the time of the application for removal being vested with

jurisdiction of controversies between citizens of different States in excess of Two Thousand Dollars).

Since the writ of error was sued out, however, this Court has decided adversely to its, plaintiff in error's contention (See *Kansas City Southern Railway Company vs. Leslie*, 238 U. S. 599), and such assignment of error is, therefore, withdrawn.

Plaintiff in error specifies as follows the errors which it urges and upon which it relies to reverse the judgment of the Court of Appeals of the State of Georgia, affirming the verdict and judgment against it:

(1st) It respectfully asserts and contends that Puckett, the defendant in error, was not engaged in interstate commerce at the time he sustained the injuries for which he brought suit, and that he, therefore, had no right to maintain against plaintiff in error a suit under the Act of Congress, approved April 26th, 1908, the same being, "An Act relating to liability of common carriers by railroads to their employees in certain cases," and which, as amended by the Act of Congress approved April 5th, 1910, is popularly known as "The Federal Employer's Liability Act," and that the Court of Appeals of Georgia erred in upholding a recovery against it in the lower court under the Federal Employer's Liability Act, and erred in deciding that Puckett was engaged in interstate commerce when injured and that his right of action was under the Act of Congress creating a liability in favor of railroad employees who might be injured while engaged in interstate commerce.

(2nd) Plaintiff in error specifies and will urge here as further error the holding of the Court of Appeals that the evidence submitted upon the trial of the case authorized the jury to find that plaintiff in error was guilty of the negligence charged, and that the verdict was supported by evidence; contrary to the contentions of plaintiff in error (a) that defendant in error had not proven the acts of negligence charged; (b) that no actionable negligence was proven upon the trial of the case; and (c) that in no event was there evidence affording proof of negligence which was proximate to the fall which defendant in error claimed to have suffered and to the injuries which he asserted attended upon such fall, it being submitted that the verdict in the case is unsupported by evidence, is contrary to the undisputed evidence, and that the recovery was, therefore, unjustified.

ARGUMENT.

PUCKETT WAS NOT EMPLOYED IN INTERSTATE COMMERCE AT THE TIME OF HIS ALLEGED INJURIES, AND, THEREFORE, WAS NOT ENTITLED TO MAINTAIN HIS ACTION UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT.

The Act of the Congress of the United States, approved April 22nd, 1908, (the second Employer's Liability Act) expressly provides that where redress in damages is accorded for injuries—fatal or otherwise—under the national law, two conditions must concur:

(1st) The common carrier by railroad must be engaged in interstate commerce at the time of the injury; and

(2nd) Such injury must be inflicted upon the employee "while he is employed by such carrier in such commerce."

It is unnecessary to enter into a discussion here as to what power Congress may have over interstate commerce and the matters and instrumentalities relating thereto. It is only necessary to consider and determine whether the facts and circumstances of Puckett's injuries bring him within the exercise by Congress of its power when it enacted the Second Employer's Liability Act.

Without regard to whether Congress could have gone further than it did and have enacted a law creating a liability for an employee of an interstate railroad common carrier without regard to the character of commerce in which such employee may have been engaged when injured, it is certain that it did not do so, and one of the essentials to an injured plaintiff's right under the national law is that he must have been employed in interstate commerce when the injury occurred.

As was said in the brief prepared and submitted by a late Solicitor General, and which is quoted in the opinion in the Second Employers' Liability Cases, 223 U. S. 1, 48:

> "Interstate commerce—if not always, at any rate, when the commerce is transportation—is an act."

And further in the opinion it is said by this Court, pages 48 and 49:

> "It does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exertion of its power over interstate com-

> merce, may regulate the relations of common carriers by railroad and their employes, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, *and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employes are engaged.*" (Italics ours.)

And in the case of *Pedersen vs. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152, the test as to the applicability of the law to a given injury is stated in the opinion of the court, pages 150, 151, as follows:

> "Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce, but it is not essential, where the casual negligence is that of a co-employe, that he also be employed in such commerce, etc."

Further, on page 152, the Court says:

> "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

In the case of *Shanks vs. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, it was held that an employee, who was in charge of a railroad's machine shop organized for repairing locomotives used in transportation, and who was injured through the negligence of the Company while taking down a heavy shop fixture through which power was communicated to some of the machinery used in the repair work, was not engaged in interstate commerce.

The Court, in its opinion, page 558, gives this clear insight into the application of the Federal statute with which we are concerned. Through Mr. Justice Van Devanter it says:

> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Company vs. United States*, 196 U. S. 375, 398), *and that the true test of employment in such commerce in the sense intended is, was the employe at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.*" (Italics ours).

This test was reapplied and the defining thereof reiterated by the Court in the case of *Chicago, Burlington & Quincy Railroad Company vs. Harrington*, 241 U. S. 177, 180.

It follows, therefore, that the facts of each case and the particular act of the employee, who either himself or whose survivors seek redress under the Federal Employer's Liability Act, must be examined and considered in the light of its surroundings and bearings, in order that it may be determined whether such employee was "at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it."

Let us look into the facts and apply the test to Puckett, the defendant in error here.

Variant reasons have been assigned in the pleadings of defendant in error, in the instructions which the trial Judge

gave to the jury and by the Appellate Court as to how and why he was engaged in interstate commerce at the time of his injury.

The first contention made by Puckett was that the cars concerned in the collision in which O'Berry was caught were at the time being actively used in interstate commerce, but the evidence disproved this. (See testimony J. L. Chappell, Printed Record, page 48, and pages 69 and 70 Printed Record as to bill of lading covering Southern car 34960.)

By an amendment to his pleadings he made the claim that it was necessary to release O'Berry and clear the track on which the collision occurred, in order that train No. 75, hereinbefore referred to,—an interstate freight train, might be made up by putting into it certain other cars; but the evidence is uncontradicted that these other cars which went into train No. 75 were moved over another track, put in that train, and that No. 75 had left on its journey before O'Berry was released, (See testimony I. H. McElroy, Printed Record, pages 53 and 54; testimony H. E. Cochran, pages, 56 and 57, Printed Record) so that this contention was unsupported by the evidence.

Another amendment was filed by Puckett to the effect that inasmuch as he was employed in interstate commerce just prior to the collision in which O'Berry was caught, and inasmuch as he expected to resume his duties later on and inspect other interstate cars, during the interval while he was engaged in assisting to release O'Berry he was employed in interstate commerce within the intent and meaning of the Federal law.

A reference to the instructions which he gave to the jury, as follows: (See page 77, Printed Record.)

> "If this plaintiff, gentlemen, at the time as alleged by him, was engaged in making up, as car inspector, a train that was to go beyond the limits of the State, carry freight beyond the limits of the State of Georgia, he would have been engaged in interstate commerce. And if you believe he was so engaged and while so engaged there was a sudden emergency in connection with an injury to O'Berry—whose name is set forth in the petition, another employee—that in the discharge of his duty under the rules and instructions from one in authority he represented the company while in an effort to release O'Berry, and in a further effort to clear the track for the movement of cars that were to go into train 75 with its other cars, with the present intention of returning immediately to the work in which he had just before been engaged, he would still, during that period, be engaged in interstate commerce and have the right to maintain this action and recover, if otherwise entitled to recover in the case;"

will show that the able Judge of the trial court took this view of the matter, and reached the conclusion that Puckett was engaged in interstate commerce, because prior to his effort to release O'Berry he was so engaged, in view of the further consideration that after he accomplished the release and relieved the imprisoned employee he intended to resume his interstate work.

Two of the theories advanced as to why Puckett was engaged in interstate commerce at the time of his injury were, therefore, destroyed by the evidence in the case.

The third theory advanced by defendant in error in an amendment and which was adopted by the trial court has, we respectfully submit, been shown by a decision of this

Court rendered subsequent to the trial of the Puckett case, to be unsound.

In the case of *Illinois Central Railroad Company vs. Behrens*, 233 U. S. 473, 478, this Court reviewed a decision rendered by the Judge of the District Court for the Eastern Division of Louisiana, the Circuit Court of Appeals for the Fifth Circuit to which the case went from the Louisiana District Court on writ of error having certified the questions.

The opinion which the District Judge entertained of the law is found in the following extract taken from the case as reported in the 192 Fed. Rep., 582. After stating that the contention of the defendant in the case was that neither it nor its deceased employee at the time of the fatality was engaged in interstate commerce, Judge Foster says:

> "In my opinion, the construction sought to be secured by the defendant is entirely too narrow and restricted. Undoubtedly the act of Congress is in derogation of the common law; but certainly the elimination of the doctrine of fellow servant and the modification of the doctrines of contributory negligence and assumed risk makes for the betterment of human rights as opposed to those of property, and I consider that, in the light of modern thought and opinion, the law should be as broadly and as liberally construed as possible.
>
> In this view of the case, I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his status, and fixes the status of the railroad, and the mere fact that the accident occurred while he was engaged in work on an intrastate train, *rather than a few minutes*

earlier or later, when he might have been engaged on an interstate train is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where the employee himself has no control over his own actions and cannot elect as to his employment, the court should not attempt to separate and distinguish between them." (Italics ours.)

This Court, however, after stating (Page 478),—

"It is clear that Congress intended to confine its action to injuries occurring *when the particular service* in which the employee is engaged is a part of interstate commerce,"

effectually disposes of the contention that the interstate character of services performed before and after determines the character of an intermediate and independent act, as follows:

"Here, at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. *That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.*" (Italics ours.)

The Behrens case is entirely different in facts and in principle from those involved in the case of *North Carolina Railroad Company vs. Zachary,* 232 U. S. 248.

Zachary's intestate, a locomotive fireman upon an interstate run, at the place of the fatality inspected and oiled

his engine, and while certain shifting was being done, undertook to make his way across the yards, and in the act of doing so was run over. The claim was made that he was enroute to his boarding house at the time and, therefore, was not employed in interstate commerce.

The Court says:

> "Again, it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

It will be observed that there was no break whatever in the work or its character upon which the deceased was engaged in the Zachary case. The only question was whether or not his temporary journey from his engine terminated entirely for the time being his service. He entered into no new duties and into no different service for his employer, and the sole inquiry was whether, at the time he was fatally injured, being absent from his engine, he was in service at all. If he was in service, necessarily it was connected with his engine and train which the evidence showed were being

used at the time as instrumentalities for the transportation of interstate commerce.

The Court held, in substance, that it could not be said as a matter of law that under the evidence the temporary absence of the deceased from his engine terminated his service.

The Georgia Court of Appeals, it will be noted, cites two decisions from this Court in formulating and supporting its opinion that Puckett was engaged in interstate commerce at the time of his injury, the case of *North Carolina Railroad Company vs. Zachary*, hereinbefore cited, and the case of *Pedersen vs. Delaware, etc., R. R. Company*, hereinbefore cited.

We have undertaken to distinguish the present case from the Zachary case. Zachary's intestate, when he left his engine, entered upon no new work. Puckett, on the contrary, did. Before the collision in which O'Berry was caught Puckett had been engaged in the inspection of interstate cars. When he undertook to get the blocks to be used for the purpose of "jacking" up the car in order to release O'Berry, he entered upon an entirely new undertaking, upon a different work, and one which had no relation to his duties as car inspector.

Congress having made the employment in interstate commerce at the time of injury essential to the existence of a right under the Federal Statute, an employee, in the variety of work which he does for a railway company in an instant of time may go from an engagement in interstate commerce to one in intrastate commerce; or, in other words, in a very brief space of time, as the character of his work may

change, the employee may go from the sphere of federal activity into that of State action and control. Even while pursuing a uniform line of duty, an employee can almost instantaneously change his status, since, when he is engaged in intrastate commerce, the law of the State governs his right, when in interstate commerce the law of the Nation governs his right, and if he is engaged in a rare and exceptional service (such as Puckett was at the time of his injury) which might have no direct bearing upon either intra- or interstate commerce, the law of the State governing the relationship of master and servant would govern his right.

Not only does the evidence show, but without evidence it would be apparent that the prime purpose and motive which actuated Puckett in going for the blocks was to release O'Berry. In other words, he was engaged essentially and primarily in an act of humanity, and this is true even though it may have been his duty to assist in the release of O'Berry.

The collision and the necessity for releasing O'Berry constituted a hiatus and complete interval in which Puckett's services as a car inspector were abandoned and during which his work and his efforts were upon an undertaking which cannot possibly have had any substantial or direct relation to interstate commerce.

The Court of Appeals of Georgia in its opinion uses language which ought to determine, according to the test laid down by this court, that Puckett was *not* engaged in interstate commerce.

After discussing the Zachary case, the Court, in the opinion (See page 556, Ga. App. Rep., Printed Record, page 86) says:

> "It is insisted that the intention of the plaintiff, at the time of his injury, in 'jacking up' the wrecked car, was to release O'Berry from his perilous position, and not to free the tracks from the obstruction so that the remaining cars to be placed in train No. 75 could be transported over the obstructed tracks. We think it immaterial that the *primary object* of the plaintiff may have been the rescue of his fellow employee, O'Berry. If the plaintiff helped to 'jack up' the wrecked car and engine, *though primarily done for the purpose of releasing O'Berry*, it was nevertheless the first step taken in clearing the obstruction from the tracks so that over these tracks could be transported the remaining cars to be placed in train No. 75. In our opinion his work facilitated the interstate commerce of the railroad, and consequently, he was engaged in interstate commerce when injured. It is immaterial that the tracks were not cleared in time for the remaining cars (that went into train 75) to be switched over them, and that these cars were detoured over other tracks." (Italics ours.)

Here, in effect, is a clear concession by the Court as to what the *primary* purpose of Puckett's work was, to-wit: "the rescue of his fellow employee, O'Berry."

How easily distinguishable, therefore, is this case from the Pedersen case, upon which the State Appellate Court relies mainly to sustain its holding that Puckett was employed in interstate commerce at the time of his injury.

In the Pedersen case the plaintiff, under the direction of his foreman, was carrying from a tool car to a bridge cer-

tain bolts and rivets which were to be used by them in repairing the bridge. The bridge in question had been put in use as an instrumentality of interstate commerce and Pedersen's work had for its object the repair of this instrumentality.

In the opinion of the Court rendered by Mr. Justice Van Devanter it was clearly pointed out that the carrying of the bolts was really a part of the work of repairing the bridge.

On page 152 (229 U. S.) of the opinion he expresses it in this clear language:

> "It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

The carrying of the bolts by Pedersen resulted from his purpose to repair the bridge and could well be said to be a work so closely related to interstate commerce as to be practically a part of it.

Here Puckett's "primary object" (to use the language of the Court of Appeals), the motive of his work, the mainspring of his action was to rescue an imperiled fellow employee, a human being pinioned between an engine and certain cars which were on fire.

Almost every act about the tracks and other instrumentalities of interstate commerce has some relation to and

some bearing upon interstate commerce; but in order for an act to constitute an employment in interstate commerce, it must affect the same immediately and directly, and not remotely and collaterally. The act in question must approach and touch interstate commerce by straight line and not obliquely. Its relation to and bearing upon it must be immediate or primary, and the fact that a given act, the primary object and purpose of which is to bring about a result apart from interstate commerce, indirectly affects that commerce, cannot constitute such act within the meaning of the Federal Employer's Liability Act, an employment in interstate commerce.

All work in a railroad yard, when viewed as a whole, is the aggregate of the separate services performed by individual employees and in this aggregate inter- and intrastate services blend and interblend.

The evidence is silent as to when the track upon which the collision occurred in which O'Berry was caught was to be used and how, whether first solely by intrastate cars or solely by interstate cars, or by both intermingled, and, therefore, unless the act which Puckett was doing at the time of his injury and the *primary* purpose of that act is to be the test, then the matter of which law to apply,—the Federal law or that of the State,—is left to conjecture and doubt.

This is well illustrated by what was said by the Court of Appeals of Kentucky in its opinion in the case of *Louisville & Nashville Railroad Company vs. Parker's Administrator*, 177 S. W. Rep. 465, 467, 468.

The deceased employee in the Kentucky case, who was a fireman, was engaged at the time of his fatal injury in switching a car which was intrastate and attached to his engine, "and the engine was engaged in switching this intrastate car from one part of the yard to another and expected shortly thereafter to remove from track Number ten some twelve or fifteen cars, so that it might switch the interstate car to another track; that is, it was engaged at the time in switching intrastate cars so that it might ultimately get at and switch to another track the interstate car."

After the above quoted statement the Court says:

> "As a matter of practical knowledge, we know that in railroad switching yards the switch engines are constantly engaged in switching both interstate and intrastate cars, and if it can be said, as a matter of law, that the crew of a switch engine, which is actually engaged in moving intrastate cars as preliminary to the ultimate moving of interstate cars, is then engaged in interstate commerce, there would never be a time when a switching crew would not be engaged in such commerce, in any railroad yards of any size. If a switching crew may be held to be engaged in interstate commerce when it is only handling intrastate cars merely because the yard foreman has ordered some time during that day or night to remove an interstate car from one part of the yard to another, and the removal of the intrastate cars is to be held merely preliminary to the ultimate removal of the interstate car, we are at a loss to understand when and under what circumstances such a crew could be held ever to be engaged in intrastate commerce."

In the case of *Illinois Central Railroad Company vs. Rogers*, 221 Fed. Rep. 52, 54, an employee, who was run over "while he was stationed near the railroad track in the act of cleaning certain stencils used by said defendant to mark the cars owned and used by said defendant in its interstate business," was held by the Circuit Court of Appeals for the Fifth Circuit not to have been employed in interstate commerce and not to be under the benefits of the national liability law; and yet his work would seem to have a more immediate and direct bearing upon interstate commerce than had the work upon which Puckett was engaged when injured. But, reasons the able Judge delivering the opinion in the case for the Georgia Court of Appeals, although primarily Puckett was engaged at work for the purpose of releasing O'Berry, "it was nevertheless the first step to be taken in clearing the obstructions from the tracks, so that over these tracks could be transported the remaining cars to be placed in train 75."

When this point was reached, however, consideration had to be given to the fact that the particular track was not used in making up train 75, and the Court, of necessity, had to go a step further and state that it was immaterial that the remaining cars intended for train No. 75 were switched into that train over other tracks.

Why could not the same argument have been made in the Behrens case, that it was necessary to move the intrastate cars upon which work Behrens was engaged when injured, in order to clear the tracks they were proceeding upon for the passage of interstate cars thereafter?

If, as this court has declared, the matter is to be viewed from a practical and not a theoretical standpoint, then it must be that Puckett's act, the immediate purpose and effect of which was to rescue a fellow human being in danger, was not in and of itself interstate commerce and was not so closely related thereto as to be a part of interstate commerce, but that its bearing upon interstate commerce was remote and indirect.

As stated heretofore, almost any act of an employee about railroad yards and tracks will eventually lead in its consequences to a point where it will effect interstate commerce; but it is only, as we understand the construction of the law as made by this Court, where such effect is direct and immediate, that the Federal Employer's Liability Act applies.

While every case has its own peculiar facts, the following cases bear directly upon the subject and are instructive:

Pennsylvania Railroad Company vs. Knox, 218 Fed. Rep. 748;

M. K. & T. Ry. Co., etc., vs. Fesmire, (Court of Civil Appeals of Texas) 150 S. W. 201;

Delaware, Lackawanna & Western R. Co. vs. Yurkonis, 238 U. S. 439;

Barker vs. Kansas City M. & O. R. R. Co., (Kansas) 146 Pac. 358;

Louisville & Nashvile Railroad Company vs. Moore, 156 Kentucky, 708; 161 S. W. 1129;

Ruck vs. Railway Company, 153 Wisconsin 158; 140 N. W. 1074;

Gray vs. Chicago & N. W. Railway Company, (Wisconsin) 142 N. W. 505;

Pierson vs. N. Y., S. & W. R. Co., 83 New Jersey Law 661; 85 Atlantic 233;

Thomas vs. Boston & M. Railroad, 218 Fed. Rep. 143;

Voris vs. Chicago, M. & St. Paul Railway Co., 172 Mo. App. 125; 157 S. W. 835;

Shanks vs. Delaware, L. & W. Railroad Company, 148 N. Y. Supp. 1034;

Louisville & Nashville Railroad Company vs. Strang's Administratrix, 156 Ky. 439; 161 S. W. 239;

Wright vs. Chicago, etc., Railway Company, 94 Nebraska 317; 143 N. W. 220;

Parsons vs. Delaware & H. Co., 153 N. Y. Supp. 179; *McAuliffe vs. N. Y. C. & H. R. R. Co.*, 150 N. Y. Supp. 512;

Granger vs. Pennsylvania Railroad Co., 84 New Jersey Law 338; 86 Atlantic 264;

Louisville & Nashville Railroad Company vs. Parker's Administrator, 165 Ky. 658; 177 S. W. 465;

Atchison, T. & S. F. Railway Company vs. Pitts, (Okla.) 145 Pac. 1148.

Shanley vs. Philadelphia & Reading R. R. Co., 221 Fed. 1012;

Boyle vs. Pennsylvania R. R. Co., 221 Fed. 453; 228 Fed. 266;

M. K. & T. R. R. Co. vs. Pace (Texas Civil Appeals), 184 S. W. 1051.

If we are correct in the position that Puckett was not engaged in interstate commerce at the time of his injury, then his recovery is illegal, and for this fundamental reason plaintiff in error is entitled to a reversal of the judgment, since while there would obtain here the reverse of the situation found in the case of *St. Louis, etc., Railway*

Company vs. Seale, 229 U. S. 156, the principle therein announced would have to be applied.

In the opinion of the Court on pages 161 and 162 it is said:

> "It comes then to this: The plaintiff's petition as ruled by the State court, stated a case under the state statute. The defendant by its special exceptions called attention to the Federal statute and suggested that the state statute might not be the applicable one. But the plaintiffs, with the sanction of the court, stood by their petition. It was to the case therein stated that the defendant was called upon to make defense. A plea in abatement would have been unavailing, because the plaintiffs were the proper parties to prosecute that case. When the evidence was adduced it developed that the real case was not controlled by the state statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the state courts erred in over-ruling it."

See also case of *Toledo, St. Louis & Western Railroad Company vs. Slavin*, 236 U. S. 457, 458.

It will be noted in the record that plaintiff in error, in every way possible, asserted the contention that Puckett was not engaged in interstate commerce. It will appear from its exceptions pendente lite (see pages 31 to 35, inclusive, Printed Record) that it undertook to non-suit defendant in error's case upon the ground that he had failed to show that he was employed in interstate commerce at the time of his alleged injury. It further appears that

when the defendant in error amended his declaration during the trial, on April 6th, 1914, the plaintiff in error then objected to the allowance of the amendment upon the ground that it did not show that Puckett was engaged in interstate commerce, and after the allowance of said amendment, renewed its general demurrer to the declaration as amended and urged the dismissal of defendant in error's suit, upon the ground that the same as amended did not by its allegations show that defendant in error was engaged in interstate commerce. To the over-ruling of this demurrer it preserved exceptions.

Plaintiff in error also in its answer denied that Puckett was engaged in interstate commerce and in every way possible it contested the point.

If he was not so engaged at the time of his injury, then he has not proven the case which he laid, or as was said in the Seale case, "The case pleaded was not proved and the case proved was not pleaded."

This fact would constitute reversible error. Besides, plaintiff in error was hurt by the trial of the case under the Federal statute. Under the State statute relating to liability by railroads to their employees contributory negligence, when amounting to a lack of ordinary care, constitutes a complete defense to a plaintiff's action, although where in degree such contributory negligence is less than ordinary care, a diminution of damages results. In other words, had the case been tried under the State statute, the following provision of Section 2783, Code of Georgia, 1911:

> "In all actions hereafter brought against any such common carrier by railroad, under or by virtue of any

> of the provisions of this, the preceding, or the four succeeding sections, to recover damages for personal injuries to an employee, or where such injuries have resulted in death, the fact that the employee may have been guilty of contributory negligence, not amounting to a failure to exercise ordinary care, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee;"

would have applied and plaintiff in error would not only have secured the benefit of a reduction of damages in the event of contributory negligence, but if the jury had found that Puckett was guilty of contributory negligence amounting in degree to a lack of ordinary care, it would have had a complete defense against his action.

Besides, if defendant in error had been forced to try his case under the State statute, when he struck the three resident co-defendants, Cowan, Smith and Biddy from the action (see Printed Record, pages 24 to 26, inclusive) plaintiff in error would have had the privilege of removing the case to the United States Court upon the ground of diversity of citizenship, or even if defendant in error had continued in the action the three individual defendants, plaintiff in error would have had the advantage of being joined upon the trial with three resident co-defendants who would have shared with it the burden and responsibility of the action.

THE EVIDENCE IN THE CASE DID NOT SHOW ACTIONABLE NEGLIGENCE, AND THEREFORE, THE RECOVERY WAS ILLEGAL.

A Federal question is presented where the contention is

made that the facts do not establish liability under the Federal law.

St. Louis, etc., Railway Company vs. McWhirter, 229 U. S. 265;

Central, etc., Railway Company vs. White, 238 U. S. 507;

Seaboard Air Line Railway Company vs. Padgett, 236 U. S. 668, 673.

Giving to the holdings of the trial court and the decision of the Georgia Court of Appeals the high weight which this Court will, yet we respectfully submit that the verdict is palpably unwarranted as a matter of law for the reason that the facts do not show actionable negligence.

The proof as to the happening in which Puckett claims to have been injured is confined to the testimony which he himself gave. His account of the matter is as follows:

(See page 38, Printed Record.)

> "As I was going down the track, I got down in about a car length and a half of the engine, I struck some clinkers, the first thing that started me—I struck those and kind of stumbled and I struck some old crossties and that shot my foot under one and I couldn't pull it out from under it, and it jerked me and threw me right face foremost and my right foot went that way, and my left was back this way, and it made me spring up in my back and the blocks fell right on top of me—across my back."

And further (See Printed Record, page 44) he says:

> "When I got these blocks and put them on my back and started back to where O'Berry was, I was walking along the east side of track 27. I was running as

hard as I could. I had my lantern with me and while I was running along there I stepped on some clinkers. I stumbled against those after I got nearly to O'Berry, just below the bridge. I mean by that north of the bridge. That is where I stumped my toe. I was still on the east side of the track. I stumped my toe against some clinkers. Some two or three, I suppose, were large ones. That started me to stumbling and in shooting this foot under the tie, jamming it up under there, it twisted and threw me right face foremost. What I stumbled on was the clinkers; that was what first started me. I never would have fell if I hadn't struck the crossties. I first stumbled against the clinkers in four or five feet of where I struck the crossties which threw me face foremost. I was running as hard as I could. I hit the clinkers and that made me stumble some. I was running as fast as I could and I hit the clinkers and that made me stumble and three or four feet from the clinkers were the crossties. When I struck the crossties, that threw me face foremost. When I am running as fast as I can, with a load like that, I could not go far in a leap. Something like three feet is about as far as I could step. I stumbled over the clinkers and jumped three feet, then my foot hit the crosstie and then I stumbled and fell right face foremost. I hit the crossties. The end of it must have been something like three and a half feet from the rail."

We quote the defendant in error's testimony at length in order that his version of the happening may be fully given.

This evidence must lead to the conclusion that the proximate cause of Puckett's injury was the fact that he stumbled over certain clinkers in a railroad yard; that when he stumbled over these clinkers they started him to falling.

The cause of his falling was his stumbling. They started him to falling and, therefore, it would clearly appear that if he had not stumbled over the clinkers, he would, in all probability, have never come in contact with the crossties.

It must follow that the presence of the clinkers in the pathway which he chose and along which it appears he was running, by causing him to stumble, set in motion and was the preponderating cause of the rapid happenings which culminated in his fall and injury. It was just as though an individual tripped another person with his foot and in stumbling forward as a result of the tripping the latter fell over some other object and was injured. Surely the tripping and not the stumbling over some other object was the proximate and preponderating cause of the fall.

If this reasoning be sound, then the legal question to be determined is whether the presence in the railroad yard of the clinkers mentioned constituted actionable negligence on the part of plaintiff in error.

It is well known that there are clinkers in all railroad yards; that the surface of railroad yards is made hard from clinkers; that engines burn coal, resulting in a refuse product called clinkers; that such clinkers are necessarily discharged from the engine, and after being discharged, naturally appear in railroad yards.

Under the Federal Employer's Liability Act there is no presumption of negligence, and, therefore, the burden of proving actionable negligence was upon defendant in error. This burden required that not only should Puckett prove the presence of the clinkers in the yard, but he must

further prove by a logical deduction from facts and the law that their presence resulted from the negligence of the Railway Company.

The bare fact that clinkers are found in a railroad yard is not one upon which, taken alone, negligence can be predicated.

The courts have uniformly recognized that the presence of clinkers in railroad yards is a necessity and have held that negligence may not be predicated upon the fact of their being found in yards.

The Supreme Court of this State in the case of *Lee vs. Central Railroad & Banking Company*, 86 Ga. 231; 12 S. E. 307, in the head-note says:

> "The presence of one clinker of unusual size on the margin of a railway track where switching is to be done, and on which a brakeman accidentally steps in descending from a moving engine in the due course of his duties, will not render the company liable to answer for a personal injury which the brakeman thus sustains. For outdoor premises to be reasonably safe, it is not required that the surface shall be kept clear of every object which by chance might cause accidental injury."

The opinion in this case pronounces that the injury to Lee was the result of an accident; that he stepped on a pile of dross in which there was a clinker "five or six inches through one way and three or four inches the other."

The Georgia Court says that these facts made of the occurrence a "doubled-barreled" accident. There happened to be this large clinker and Lee happened to step on it. So

in the present case, there happened to be the clinker over which Puckett stumbled and he happened to choose for his route one upon which there lay the clinkers over which he stumbled.

The State Supreme Court discusses the reason for and the likelihood of the presence of clinkers in railroad yards and says:

> "It cannot be incumbent upon railroad companies, or anyone else in such a world as this, to keep the whole face of the earth on which servants and employees are to execute their functions clear of every object that may cause an employee to slip up or be thrown down. Such a rule would require that farmers should keep their premises clear of corn cobs; for a corn cob, when stepped upon, may roll under the foot and produce a fall. So of small stones and sometimes sticks or other rubbish. The plaintiff's injury was simply a misfortune, the incident of his employment and of the risk consequent thereon."

The opinion of the able Judge—Chief Justice Bleckley—in the case quoted from has never been overturned or departed from. It is still the law, expressed in common sense; and measured by it, how can this defendant in error recover of this plaintiff in error for injuries received by tripping and stumbling over clinkers in a railroad yard?

The Court of Appeals in its opinion holds that it was a question for the jury (1st) as to whether or not the presence of the clinkers constituted negligence; and (2nd) whether or not the presence of the crosstie constituted negligence, and that it was a question for the jury as to what is the proximate cause of the injury.

It is often a question of fact as to what is the proximate cause of an injury, but here the facts are undisputed and there is no way to confuse the mind with regard to them, and only one deduction can be reached by a reasonable mind and that is, that the clinkers which started Puckett to stumbling were the preponderating cause of his fall and therefore, were the proximate cause of his injury.

If this be sound, then the presence of the crossties in the yards is eliminated from consideration in determining whether or not the record contains proof of actionable negligence.

The Court of Appeals in the case of *Bowers, Admx., vs. Southern Railway Company*, 10 Ga. App. Rep. 367; 73 S. E. 677, has distinctly held that negligence, in order to furnish the basis of liability under the Federal Act, must be proximate to the injury; and with the highest respect for that Court, we beg to submit that it cannot, under undisputed facts and under only a single version of the injury, avoid the determination as a matter of law as to what was the proximate cause of the injury and whether or not that proximate cause constituted actionable negligence by holding that the issues were broadcast for the jury.

A case very similar in the facts upon which it is based to the facts found in the record of the present case is that of *Schaller vs. Lusk, et al.*, (Missouri), 184 S. W. 1179.

In the syllabus we find this statement:

> "Where a servant's duties required him to go upon a locomotive running board in defendants' shop, and in reaching over a wire attached to the engine his foot

> caught, causing him to start to fall, and in his fall he caught a loose branch pipe which fell with him, his action for injury, brought on the ground of the master's negligence in not furnishing a safe place to work, the catching of his foot, and not the loose branch pipe, was the 'proximate cause' of the injury, that is, the thing which set in motion a train of events that in their natural sequences ought to be expected to produce the result of which the complaint is made."

The case of *Lee vs. Central Railroad & Banking Company*, hereinbefore cited, came under review by the Supreme Court of Georgia in the case of *Seaboard Air Line Railway vs. Bishop*, 132 Ga. 82; 63 S. E. 1103, and in the last named case this comment is made upon it,—

> "In the Lee case in 86 Ga., a brakeman stepped on a pile of ashes and dross lying beside the track, arising from raking out the furnaces of engines, and his foot turned on a clinker of unusual size. In cleaning out the furnaces of engines, there was no negligence in withdrawing clinkers, and diligence did not require absolute freedom from clinkers along the track."

If the decisions of the Supreme Court of Georgia are adhered to, then it follows that negligence could not be predicated on the presence of the clinkers, and the stumbling over the clinkers being the proximate cause of the injury, the result must be that no actionable negligence was proven and, therefore, that the verdict is unsupported.

The Court of Appeals of Georgia in the case of *Georgia Railroad vs. Hunter*, 12 Ga. App. Rep. 294; 77 S. E. 176, distinguished that case from the Lee case, since in the Hunter case it appeared that there had accumulated a pile of clinkers which made a large and dangerous obstruction;

but in the Hunter case it was recognized that the Lee case is "authority for the proposition that a railroad company is not bound to keep its premises free from all objects which may cause an employee to slip up or fall down."

Puckett stumbled over certain clinkers. This started him to falling and set in operation the train of happenings which resulted in his injury; or in other words, the proximate cause of his injury was an accident, the stumbling over an object which he happened to encounter in choosing a particular route, the stumbling perhaps being somewhat contributed to by his running while impeded with the blocks which he was carrying.

If the preponderating cause of his injury is traceable to an accidental happening, then negligence, according to the law's conception, has not been shown.

The decisions of our courts abound in similar happenings which are defined to be "Accidents". A reference to a few of them as analogies may serve to emphasize the view that the occurrence in which Puckett was injured must be considered an Accident for which plaintiff in error is not legally responsible.

In the case of *East Tennessee Railway Company vs. Sudduth*, 86 Ga., 338, it was held that the fact "that the employee, while passing in the course of his duty from a car loaded with ore, stepped upon a piece of ore, which turned under his foot, whereby he was precipitated from the car and severely injured" is evidence of injury by Accident rather than by any fault or negligence of the company.

In the Lee case in the 86th Georgia, which has been

cited, where an employee stepped on a clinker, the court says:

> "The plaintiff's injury was simply a misfortune, the incident of his employment and of the risk consequent thereon;"

and this occurrence in this case was styled by Judge Bleckley a "doubled-barreled accident."

In *East Tennessee, Virginia & Georgia Railroad vs. Reynolds*, 93 Ga. 570, the employee was in the act of crossing a trestle to flag an approaching train and was injured by a fall caused by stepping upon a decayed crosstie. The injury was held to be a "mere casualty incident to the business in which the plaintiff was engaged."

Another case of accident which would appear to be conclusive of this case, (and if in this case the crossties complained of could in any view be invoked as legally affecting defendant's liability, conclusive of that claim also), is the case of *Zipperer vs. Seaboard Air Line Railway*, 129 Ga. 387, where an employee stepped upon a steel rail lying alongside the track.

The most recent case in line with those just cited, and in which the Supreme Court follows the doctrine announced in these cases, is the case of *Wadley Southern Railway Company vs. Durden*, 142 Ga. 361; 82 S. E. Rep. 1055.

It would seem, therefore,

(1st) That the clinkers were the proximate cause of Puckett's injury;

(2nd) That as to his employer negligence could not be predicated upon the presence in the yard of the clinkers;

(3rd) That the occurrence in which defendant in error received injury was an accident,—a casualty, a misfortune which resulted from one of the risks which he assumed.

In contending that the evidence shows that the proximate cause of defendant in error's injury resulted from his stumbling over the clinkers we have purposely avoided entering into a technical discussion as to what constitutes "proximate cause".

As stated heretofore, we realize that the question as to what constitutes the proximate cause of an injury is generally a question of fact, but in this case there is no dispute as to the facts and where a given state of facts is set forth the law will determine therefrom the legal value and significance to be given, and under such conditions the question of fact is necessarily transmuted into one of law.

It is enough to say that the proximate cause of an injury in the ultimate analysis is the "*causa causans*," the condition causing, or it is the "*causa sine qua non*," the condition without which the occurrence could not have happened.

Tested by either of these definitions, it is respectfully submitted that the minds of reasonable men must arrive at the conclusion that the presence of the clinkers over which Puckett stumbled and his stumbling over the same created the condition which caused his injury and that without such condition the injury would not have occurred.

It may be of interest to the Court to know the holding of the Georgia courts upon questions involving "proximate cause," and we therefore, cite several:

Perry vs. Central, 66 Ga. 746;
Henderson, by next friend, vs. Dade Coal Co., 100 Ga. 568;
Mayor and Council of Macon vs. Dykes, 103 Ga. 847;
Central of Georgia Railway Company vs. Price, 106 Ga. 176;
Central of Georgia Railway Company vs. Edwards, 111 Ga. 534;
Southern Transportation Company vs. Harper, 118 Ga. 672;
Postal Telegraph Cable Company vs. Kelly, 134 Ga. 218;
Shaw vs. Mayor and Council of Macon, 6 Ga. App. Rep. 306;
Southern Railway Company vs. Barber, 12 Ga. App. Rep. 286.

THE VERDICT IS NOT ONLY UNSUPPORTED BY EVIDENCE BUT UPON THE OTHER HAND IS CONTRARY TO THE UNDISPUTED EVIDENCE.

Southern Railway Company, upon the principle of respondeat superior, was sought to be held responsible for certain acts of neglect and omission charged against certain of its agents, Cowan, Biddy and Smith.

The contention is made by Puckett that these men, belonging to the Roadway Department of Southern Railway Company and charged with certain duties, were negligent in permitting a large clinker over which he stumbled to be at a place in the yards where employees, in the course of their duties, might be required to walk, and in allowing the crosstie over which he claims to have fallen to be so

near to a particular track alongside which he further claims that it was proper for him to walk.

Of course the plaintiff can only recover upon the negligence charged.

Georgia Railroad & Banking Company vs. Oaks, 52 Ga. 410;
Port Royal and Augusta Railway Company vs. Tompkins, 83 Ga. 759; 10 S. E. 356;
Central Railroad vs. Hubbard, 86 Ga. 624; 12 S. E. 1020.

He has elected to select three individuals and to charge them with negligence, imputing responsibility to Southern Railway Company for the same.

Had he continued his action against the three individuals above named, it would have been necessary that a verdict should have been returned against one or more or all of such individual defendants before a verdict could have been legally returned against Southern Railway Company.

Southern Railway Company vs. Harbin, 135 Ga. 122; 68 S. E. 1103;
Salmon vs. Southern Railway Company, 137 Ga. 636; 73 S. E. 1062.

Although by an amendment he struck these individuals from the suit, the principle announced in the cases last cited still applies and it is necessary that Puckett shall have established such negligence against these individuals as would have rendered them liable to him, if he had continued them as co-defendants with Southern Railway

Company in the action in order to justify his recovery.

In other words, in the final analysis of the matter, the test of the Railway Company's liability is whether or not the three individuals, any or all, could be held liable by Puckett in an action against them.

There is not one particle of evidence as to when the large clinker and the crosstie became located upon the yard premises of the Railway Company, as Puckett swears they were on the particular night he claims to have been injured. How they came there, who placed them there, how long they had remained there, all are left in doubt.

Cowan, Biddy and Smith swear positively that they performed their respective duties in the Roadway Department and none of them knew of the presence of the clinker or the cross-tie at the place where Puckett swore it was. (See Printed Record, pages 58 and 59 and 60, 63 inclusive.)

In view of the decision of our Supreme Court in the cases of,—

Lee vs. Central Railroad & Banking Company, 86 Ga. 231; 12 S. E. 207; and

Zipperer vs. Seaboard Air Line Railway, 129 Ga. 387; 58 S. E. 872,

it would hardly be contended that the presence of an unusually large clinker would impute negligence to the Railway Company.

This point has already been discussed in our contention that the verdict is not supported by necessary facts.

Cowan testified that he went over this portion of the

yards just prior to the alleged accident and that the clinkers and crosstie were not at that time where Puckett swore they were.

This evidence is uncontradicted.

In a case based upon the Federal Employer's Liability Act there is no presumption of neglience; (*Louisville & Nashville Railroad Company vs. Kemp*, 140 Ga. 657; 79 S. E. 558) but the burden is upon the plaintiff to prove the negligence charged, unaided by any statutory presumption.

If the evidence does not show that Cowan, Biddy and Smith, any one or all, were guilty of negligence as charged, then the plaintiff cannot recover and the verdict is illegal.

We respectfully submit that the evidence not only failed to affirmatively show neligence on the part of these three individuals, but on the contrary, it was affirmatively proven upon the trial that they were not guilty of the acts of negligence charged.

Consequently we respectfully contend that the lower court erred in not setting aside the verdict upon the ground that it was unsupported by the evidence.

That it is necessary, under the Federal Employer's Liability Act to prove negligence, and that there can be no recovery until this burden has been carried, and the failure to exercise ordinary care in the particulars on account of which negligence is charged is shown, see opinion of the Court in the case of *Seaboard Air Line Railway vs. Horton*, 233 U. S., pages 501, 502.

To sum up: It is respectfully urged that a judgment of reversal should be entered by this honorable court, *first*, because Puckett was not engaged in interstate commerce when injured, and, *second*, because the verdict and judgment are unsupported by proof of facts (a) showing actionable negligence; (b) proving the acts of negligence as charged.

Respectfully submitted,

L. E. Jeffries

E. A. Black

Sanders McDaniel

Attorneys for Southern Railway Company, Plaintiff in Error.

FILED
MAR 3 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

H. E. PUCKETT,
Defendant in Error.

No. 219
October Term
1916

SUPPLEMENT TO BRIEF FOR PLAINTIFF IN ERROR

INDEX TO ORIGINAL BRIEF AND SUPPLEMENT

L. E. JEFFRIES,
E. R. BLACK,
SANDERS McDANIEL,
Attorneys for Plaintiff in Error.

INDEX

ORIGINAL BRIEF

Page of Brief.

STATEMENT 1, 6

SPECIFICATIONS OF ERROR 6, 8

Puckett was not employed in interstate commerce .. 8-28

Atchison, T. & S. F. Ry. Co. vs. Pitts, 145 Pac. 1148.. 25

Barker vs. Kansas City M. & O. R. R. Co., 146 Pac. 358 24

Boyle vs. Pa. R. R. Co., 221 Fed. 453; 228 Fed. 266.. 25

Chicago, Burlington & Q. R. R. Co. vs. Harrington, 241 U. S. 177, 180..... 11

Delaware, L. & W. R. Co. vs. Yurkonis, 238 U. S. 439. 24

Granger vs. Pa. R. R. Co.,84 N. J. Law 338; 86 Atl. 264 25

Gray vs. Chicago & N. W. Ry. Co., 142 N. W. 505.... 24

Illinois Central R. R. Co. vs. Rogers, 221 Fed. Rep. 52, 54 23

Illinois Central R. R. Co. vs. Behrens, 233 U. S. 473, 478 14

Louisville & Nashville R. R. Co. vs. Moore, 156 Ky. 708; 161 S. W. 1129 24

Louisville & Nashville R. R. Co. vs. Parker's Admr., 165 Ky. 658; 177 S. W. 465.....21, 25

Louisville & Nashville Railroad Co. vs. Strang's Admr., 156 Ky. 439; 161 S. W. 239..... 25

M. K. & T. Ry. Co., etc., vs. Fesmire, 150 S. W. 201.. 24

Page of Brief.

M. K. & T. R. Co. vs. Pace, 184 S. W. 1051..... 25

McAuliffe vs. N. Y. C. & H. R. Co., 150 N. Y. Supp. 512 25

North Carolina R. R. Co. vs. Zachary, 232 U. S. 248..15, 17

Parsons vs. D. & H. Co., 153 N. Y. Supp. 179..... 25

Pedersen vs. D. L. & W. R. R. Co., 229 U. S. 146, 152.10, 17

Pennsylvania R. R. Co. vs. Knox, 218 Fed. Rep. 748.. 24

Pierson vs. N. Y. S. & W. R. Co., 83 N. J. Law 661; 85 Atl. 233 25

Ruck vs. Railway Co., 153 Wisconsin 158; 140 N. W. 1074 24

Second Employers' Liability Cases, 223 U. S. 1, 48.. 9

Shanks vs. D. L. & W. R. R. Co., 239 U. S. 556..... 10

Shanks vs. D. L. & W. R. R. Co., 148 N. Y. Supp. 1034 25

Shanley vs. Pa. & Reading R. R. Co., 221 Fed. 1012.. 25

St. Louis, etc., R. Co. vs. Seale, 229 U. S. 156..... 25

Thomas vs. B. & M. R. R., 218 Fed. Rep. 143..... 25

Toledo, St. L. & W. R. R. Co. vs. Slavin, 236 U. S. 457, 458 26

Voris vs. Chicago, M. & St. P. Ry. Co., 172 Mo. App. 125; 157 S. W. 835 25

Wright vs. Chicago, etc., R. Co., 94 Neb. 317; 143 N. W. 220 25

EVIDENCE DID NOT SHOW ACTIONABLE NEGLIGENCE 28-39

Bowers, Admx., vs. Southern Ry. Co., 10 Ga. App. Rep. 367; 73 S. E. 677 34

Page of Brief.

Central of Ga. Ry. Co. vs. Edwards, 111 Ga. 534.... 39

Central of Ga. Ry. Co. vs. Price, 106 Ga. 176..... 39

Central, etc., Ry. Co. vs. White, 238 U. S. 507..... 29

East Tennessee, V. & G. Ry. Co. vs. Reynolds, 93 Ga. 570 37

East Tennessee Ry. Co. vs. Sudduth, 86 Ga. 338.... 36

Georgia Railroad vs. Hunter, 12 Ga. App. Rep. 294; 77 S. E. 176 35

Henderson, by n. f. vs. Dade Coal Co., 100 Ga. 568.. 39

Lee vs. Central R. R. & Bkg Co., 86 Ga. 231; 12 S. E. 307 .....32, 35

Mayor and Council of Macon vs. Dykes, 103 Ga. 847. 39

Perry vs. Central, 66 Ga. 746 39

Postal Telegraph Cable Co. vs. Kelly, 134 Ga. 218.. 39

Schaller vs. Lusk et al., 184 S. W. 1179..... 34

Seaboard Air Line Ry. Co. vs. Bishop, 132 Ga. 82; 63 S. E. 1103 35

Seaboard Air Line Railway Co. vs. Padgett, 236 U. S. 668, 673 29

Shaw vs. Mayor and Council of Macon, 6 Ga. App. Rep. 306 39

Southern Railway Co. vs. Barber, 12 Ga. App. Rep. 286 39

Southern Transportation Co. vs. Harper, 118 Ga. 672. 39

Wadley Southern Railway Co. vs. Durden, 142 Ga. 361; 82 S. E. Rep. 1055 37

Page of Brief.

Zipperer vs. S. A. L. Ry., 129 Ga. 387 37

VERDICT UNSUPPORTED BY EVIDENCE AND CONTRARY TO UNDISPUTED EVIDENCE.. 39-43

Central R. R. vs. Hubbard, 86 Ga. 624; 12 S. E. 1020. 40

Georgia R. R. & Bkg. Co. vs. Oaks, 52 Ga. 410 40

Lee vs. Central R. R. & Bkg. Co., 86 Ga. 231; 12 S. E. 207 41

Louisville & Nashville R. R. Co. vs. Kemp, 140 Ga. 657; 79 S. E. 558 42

Port Royal & Augusta Ry. Co. vs. Tompkins, 83 Ga. 759; 10 S. E. 356 40

Salmon vs. Southern Railway Co., 137 Ga. 636; 73 S. E. 1062 40

Seaboard Air Line Railway vs. Horton, 233 U. S. 501, 502 42

Southern Railway Co. vs. Harbin, 135 Ga. 122; 68 S. E. 1103 40

Zipperer vs. S. A. L. Ry. Co., 129 Ga. 387; 58 S. E. 872 41

SUPPLEMENT.

PUCKETT NOT ENGAGED IN INTERSTATE COMMERCE 1, 4

Erie R. R. Co. vs. Welsh, 37 Supreme Court Reporter 116 1

Illinois Central R. R. Co. vs. Behrens, 233 U. S. 473. 1, 3

Louisville & Nashville R. R. Co. vs. Parker, Admr., 242 U. S. 13 2

Minneapolis & St. Louis R. R. Co. vs. Winters, 37 Supreme Court Reporter 2

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
H. E. PUCKETT,
Defendant in Error.

No. 219.
October Term,
1916.

SUPPLEMENT TO BRIEF FOR PLAINTIFF IN ERROR.

Since the preparation and filing of the original brief certain cases have been decided by this Court which, in our opinion, bear so directly upon the question as to whether or not Puckett was engaged in interstate commerce within the meaning of the Federal Employer's Liability Act, when injured, that we are warranted in calling attention to them.

In the case of *Erie Railroad Company, Plaintiff in Error, vs. Welsh,* 37 Supreme Court Reporter 116, *Illinois Central Railroad Company vs. Behrens,* 233 U. S. 473, is followed, and the principle decided therein is applied to the Welsh case which was decided on December 18th, 1916.

In the opinion of the Court by Mr. Justice Pitney, after recounting the immediately preceding duties upon which Welsh was engaged, the Court concludes the narrative as to the details of his service and announces a legal conclusion respecting the same in the following language:

> * * * ; "that on this return journey the engine was slowed down near the yardmaster's office, which is at the easterly end of that yard, so as to enable Welsh to report for further orders, all previous orders having been executed; and that the injury was received while he was attempting to alight for that purpose.

It was in evidence also, that the orders plaintiff would have received, had he not been injured on his way to the yardmaster's office, would have required him immediately to make up an interstate train. Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion, this view is untenable. By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the Act." (Citing the Behrens case.)

This decision reinforces the Behrens case in sustaining the contention which plaintiff in error makes, to-wit: that the fact that Puckett was engaged in interstate commerce immediately before his injury and expected to resume his engagement therein cannot determine the question; but the character of the work which he was engaged in at the time of the injury,—the rescue of an imperilled fellow employee, —furnishes the decisive test.

The attention of the Court is also called to the case of *Minneapolis & St. Louis Railroad Company, Plaintiff in Error, vs. Winters,* 37 Supreme Court Reporter, 170.

In the brief filed on behalf of defendant in error the case of *Louisville & Nashville Railroad Company vs. Parker, Admr.*, 242 U. S. 13, is cited.

It is respectfully submitted that the circumstances under which Parker's intestate was fatally injured are entirely different from those attending upon Puckett's injury.

In the Parker case the immediate, direct and exclusive

object of the work of the engine upon which he was engaged as fireman was, according to the strong evidence in the case, to reach and move an interstate car. While the car attached to the engine was not moving in interstate commerce, it was being transferred from one track to another for the purpose of reaching the interstate car. The Court in the opinion says:

> "The difference is marked between a mere expectation that the act done would be followed by other work of a different character, as in *Illinois Central R. R. Co. vs. Behrens*, 233 U. S. 473, 478, and *doing the act for the purpose of furthering the later work.*" (Italics ours.)

In the case of Parker the intrastate car would never have been moved except as incidental to reaching the interstate car.

In the instant case the imprisoned and imperilled employee would have been rescued and would have received the aid of Puckett in the effort, whether any previous interstate commerce had been engaged in and whether any further interstate commerce remained to be conducted.

Therefore, the immediate work upon which Puckett was engaged was not interstate commerce, but, as we have endeavored to show, any bearing which it may have had upon such commerce was necessarily secondary and incidental.

It may not be amiss to call attention to what we conceive to be an error in the argument made by the distinguished counsel for plaintiff in error.

On page 3 of the brief filed in his behalf (referring to Puckett's work just prior to his injury) it is stated:

> * * * "His work was temporarily interrupted by an obstruction upon another track which prevented

the completion of his work of inspecting the remainder of the cars."

Further along (See pages 14 and 15) the argument proceeds upon the theory that Puckett's work as a car inspector was interrupted by the collision in which O'Berry was caught. Such was not the case in the sense intended. The collision and the obstruction of the tracks cannot, we respectfully contend, be fairly treated as a physical obstacle to or interruption of Puckett's work, which was the inspection of cars; and yet the argument for defendant in error, it will be noted, has for its basis the idea that there was actual physical interruption.

Had he not departed entirely from his duties as car inspector, there was no physical obstacle created by the collision in which O'Berry was caught to prevent his going on with his work of inspecting cars. As a matter of fact, the evidence shows that train No. 75, the cars of which he was to inspect, was made up without him.

It is more accurate to state that the collision and imperilling of the fellow employee *changed* Puckett's work rather than to state that it interrupted his work, and the instances given in the brief by way of illustration of physical obstacle and obstruction to the performance of an interstate task are, therefore, inept.

Respectfully submitted,

L. E. Jeffries

E. E. Black

Sanders McDaniel

Attorneys for Southern Railway Co.,
Plaintiff in Error.

Office Supreme Court, U. S.
FILED
FEB 26 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error

vs.

H. E. PUCKETT,
Defendant in Error,

No. [redacted]219
OCTOBER TERM
1916

Brief for Defendant in Error.

EDGAR WATKINS,
SPENCER R. ATKINSON,
E. W. BORN,
Attorneys for Defendant in Error.

JOHNSON PRINTING CO., ATLANTA

INDEX

Page of Brief

PRELIMINARY STATEMENT 1-2

THE PLAINTIFF WAS ENGAGED IN INTERSTATE COMMERCE 3-15

Ill. Central R'ld Co. v. Behrens, 233 U. S. 473.. 3

L. & N. R'ld Co. v. Parker, Admnr. of Parker, 242 U. S. 13, decided Nov. 13, 1916..... 15

Miss. Kan. & Tex. R'ld Co. v. U. S. 231 U. S. 112 13

N. C. R'ld Co. v. Zachary, 232 U. S. 249..... 12

N. C. R'ld Co. v. Zachary, 232 U. S. 248..... 15

N. Y. Central R'ld Co. v. Carr, 238 U. S. 260-1 et seq. 15

Pedersen v. Del. Lack. & W. R'ld Co. 229 U. S. 146-151 13

Pedersen v. Del. Lack. & W. R'ld Co. 229 U. S. 146 13

Pedersen v. Del. Lack. & W. R'ld Co. 229 U. S. 146 15

St. L. & San Francisco R'ld Co. v. Seale, 229 U. S. 156-161 13

St. L. & San Francisco R'ld Co. v. Seale, 229 U. S. 156 14

THE NEGLIGENCE OF THE DEFENDANT COMPANY WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY 16

Lee v. Central R'ld & Banking Co. 236 Ga. 231.. 16

Page of Brief

THE EFFICIENT CAUSE OF THE INJURY WAS THE NEGLIGENT LEAVING CROSS-TIES ACROSS THE PATH 18

Central of Ga. R'ly Co. v. Debray, 71 Ga. 406.. 25

Richmond & Danville R'ld Co. v. Mitchell, 95 Ga. 79 26

In the Supreme Court of the United States

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
H. E. PUCKETT,
Defendant in Error.

No. 598

OCTOBER TERM, 1916.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF FOR DEFENDANT IN ERROR.

The writ of error in the above entitled cause brings under review the judgment of the Court of Appeals of the State of Georgia, affirming a judgment rendered in the City Court of Atlanta against the Southern Railway Company, based upon a verdict rendered in a suit for personal injuries sustained by the plaintiff while engaged in interstate commerce.

The declaration in the first instance was in two counts, one based upon the State law and the other upon the Federal Employer's Liability Act.

The first count was abandoned by the plaintiff.

The second count alleged in the first instance the joint

and concurrent negligence of the Railroad Company and three of its employees, R. L. Cowan, track foreman; Samuel Smith, track supervisor, and J. N. Biddy, roadmaster. By amendments which were made the three persons just named were eliminated as parties defendant, and the case was left to stand against the Railroad Company alone.

In the opinion of the court delivered as the basis of the judgment sought to be reviewed, which will be found on pages 82 et seq. of the record, there is a concise statement of such facts as may be needful in presenting the general features of the case. We, therefore, do not here set them out, but will hereafter refer, in the appropriate connection, to such parts of the testimony as may be needful to a clear understanding of the questions presented.

One of the principal contentions of the plaintiff in error in the court below was that the court erred in refusing, upon a petition for removal, to transfer this case into the Federal Court. Error was assigned upon this ruling but we are informed now by counsel for the plaintiff in error, by a statement contained in their brief, that the assignment of error based upon this ruling has been abandoned.

We do not presume the court will consider any other questions made in the case except those growing out of the construction of the Employer's Liability Act, since the only Federal question made is based upon the proposition that the plaintiff was not at the time of his injury engaged in interstate commerce. We submit that if it be determined that the plaintiff was engaged in interstate commerce the question as to whether or not the court ruled correctly as to the proximate cause of his injury cannot be brought under review in this writ of error.

WAS THE PLAINTIFF ENGAGED IN INTERSTATE COMMERCE?

There is no dispute that the Southern Railway Company was engaged in interstate commerce, and the testimony of the plaintiff is uncontradicted upon the following points:

That he was upon the day named in the declaration employed by the defendant company as a car inspector and that his duties were to inspect cars being used in interstate and intrastate traffic indiscriminately; that immediately preceding the time of his injury the plaintiff had been specially assigned to the task of inspecting a train of cars loaded with interstate commerce and destined immediately to move in the interstate commerce of the defendant company; that after he had inspected a portion of the cars intended to enter into said train and which had been incorporated in it, his work was temporarily interrupted by an obstruction upon another track, which prevented the completion of his work of inspecting the remainder of the cars. The obstruction consisted of a wrecked car and a disabled engine remaining on the track as a consequence of a collision between the said engine and car and other cars. The said engine and cars which produced the obstruction were engaged in intrastate traffic. Another employee of the defendant company engaged in the handling of the wrecked cars was caught under the wreck and pinioned so that he could not be released without blocking up the cars.

The plaintiff was instructed by his superior officer in authority to assist in bringing the jack and blocks to be used in removing the wrecked car, in relieving the injured man, and in clearing the track of obstruction. In obtaining the jack and blocks plaintiff, in company with other employees of the defendant company, were com-

pelled to bring them upon their shoulders for some distance, and while passing along a pathway by the side of the track plaintiff stumbled over some clinkers lying in the pathway and then as he was in the act of recovering himself he caught his foot under an old cross tie which had been left within two and a half feet of the track, and as a consequence of catching his foot he fell heavily forward, the blocks falling upon him and seriously injuring him.

It was the purpose and duty of the plaintiff, in the event he had not been injured, to have returned and finished his uncompleted task of inspecting the remainder of the cars destined to go into the defendant's interstate train. He was prevented from completing his task because of his injuries.

As matter of fact the train was finally made up and departed to its destination after a delay of about an hour, it being necessary in order to set the train upon its way that it be detoured around the obstruction referred to.

The principal contention of the defendant in the case was that the plaintiff was not engaged in interstate commerce, but there are others to which we will refer hereafter.

WE SUBMIT THAT THE PLAINTIFF WAS ENGAGED IN INTERSTATE COMMERCE.

The principal reliance of the defendant was upon the principle announced in the case of

Illinois Central Railroad Co. v. Behrens, 233 U. S., p. 473.

The Berhens case is not authority against the proposition that Puckett was engaged in interstate commerce

at the time he was injured. That case and this are clearly distinguishable upon their facts. Behrens, although employed to work indiscriminately in the interstate and intrastate commerce of the defendant company, had been assigned to the duty of assisting in the movement of a train of cars which was then engaged in the handling of intrastate commerce exclusively, and while so engaged was injured, the Court holding that it did not make any difference that Behrens might have thereafter intended to engage in the interstate traffic of the company, denied a recovery upon the ground that he was not engaged in interstate commerce at the time of his injury.

Puckett, the plaintiff in this case, although employed indiscriminately in the inspection of interstate and intrastate cars, had been assigned to the special duty of inspecting a train of cars which was then being used exclusively in interstate traffic. While so engaged his work of inspection was interrupted, not by any act of his own, but by circumstances beyond his control, and which interposed a temporary obstacle to the completion of the task which had been assigned to him.

Had he not been injured it would have been his duty to complete his task of inspecting the interstate train. He was prevented from completing it by reason of the injury which he sustained, and we submit that while engaged in removing said obstruction there never was a time when he was not engaged in interstate traffic, within the meaning of the Employer's Liability Act.

While inspecting the cars already inspected he was under the protection of the Federal statute. If he had not been injured he would have been under like protection while completing his task. In the interval he was injured in clearing the track of the defendant company so as to admit of the passage of this interstate traffic and of the movement of the other cars which he was actually engaged in inspecting. It can make no difference,

we submit, so far as concerns Puckett's relation to the work of the company that the remaining cars were actually inspected in another part of the yard, or that the cars were in fact delivered and actually passed out over another track.

That Puckett was not a volunteer is certain because he entered upon the service in which he was engaged upon the express order of his superior officer. He was not injured while engaged in intrastate traffic because the work he was engaged in related exclusively to the movement of an interstate train. It is true that the wrecked car contained intrastate traffic but with the movement of that car Puckett was not concerned. His business was that of a car inspector. His only interest, as related to the business in which the company had him then employed, was to clear the track so that he could proceed with his work of inspection and enable the train to proceed on its interstate run. This could not be done until the injured man was released from the wreck, and therefore the release of the injured man, while possibly prompted by an impulse of humanity which probably appealed to every employee of the company, was nevertheless an indispensible incident to the continued movement of the defendant's interstate traffic.

Puckett on this occasion was engaged in inspecting cars in freight train No. 75, which train was scheduled to run from Atlanta to Birmingham, Alabama. At the time he was injured he had inspected some twenty-three to twenty-five cars in this train. There remained to be inspected some twelve or fourteen cars, which were to be placed in train No. 75. While plaintiff was making his entries of the inspection of said cars in his car inspection book, and while waiting for the remainder of the cars to be placed in train No. 75, so that he could finish his work of inspecting the cars and train, a box car was derailed nearby in a collision in such a manner as to block the track where the other cars were sta-

tioned so as that the remainder of said twelve or fourteen cars could not be pulled out of the track and placed in the train, and it was while plaintiff was jacking up this car so as to extricate O'Berry and so that said twelve or fourteen cars could be moved and placed in train No. 75 that he was injured.

On account of these cars being blocked the said freight train No. 75 was delayed about an hour.

There is no question but what this freight train No. 75 was destined to Birmingham, Ala., and was engaged in interstate commerce.

Finally said twelve or fourteen cars were detoured and carried to the South end of the track on which the said car was derailed going some distance, approximately a mile out of the way, and then brought and put into said freight train No. 75, but not until said freight train had been delayed about an hour waiting for these cars to be placed in it before it could leave for Birmingham.

It was while plaintiff was carrying blocks on his shoulder for the purpose of jacking up said car and placing it on the track so that the said twelve or fourteen cars could be pulled out and placed in train No. 75 that he was injured. It was his duty after said cars had been placed in train No. 75 to finish inspecting the cars before the train left for Alabama, but on account of the injury sustained while working with said derailed car he was not able to finish inspecting train No. 75.

All of the evidence, both for the plaintiff and the defendant shows that the car was derailed; that the derailed car blocked the placing of the remainder of the cars in train No. 75, and that before the remainder of the cars to go in No. 75 could be placed in train No. 75 it was necessary to detour the cars; and that on account of the said car being derailed train No. 75 was delayed about an hour. Puckett testified (Page 39, Record):

"I suppose they were delayed something like an hour."

He also testified (Page 39, Record):

"When additional cars were put into the cars that I had already inspected, they got past the wrecked car being pulled back this way because they could not pull them North. South is the way they pull them on track 26. They couldn't pull them out of the North end on account of the car being damaged. Ed Jackson tried to push a car slowly by and it side swiped it. Then he pushed out of 26 track. Train 75 carries any freight to Anniston—made its first stop at Anniston for setting off cars."

He also testified (Page 42, Record):

"I went up to get the jacks so I could jack the car up, hold it up so O'Berry could be pulled out from between the car and the engine—released from there. I went to get the jacks for him and then the car to be placed on its trucks so it could be handled, could place it while we were holding it up there."

He also testified (Page 38, Record):

"No. 75 train has from 35 to 38 cars. I had inspected 23 to 25 cars that were to go into 75 that night. There remained to be inspected and to complete the train something like about 12 or 14 cars. If I had not been hurt it would have been my duty to have inspected the balance of those cars. After I was injured I did not go on and inspect the cars. I got hurt and was not able to get up to do any more work that night. I was not physically able."

Also Puckett testified (Page 38, Record):

"Lindsay was the Yard Conductor. He had charge of making up 75 train. I told Mr. Lindsay—Are you going to let this man die? Walt (meaning Lindsay) said—Henry, you go over there and get the jacks; you know where to get them."

Puckett further testified (Page 42, Record):

"When I first heard of it I was down in our little old office writing up my work. We had just finished the cars in 75, that is, those that had been put in on the track. Had just finished those and had walked inside of the office for checking them off of my little book on to the big book that we had in the office, and we heard this crash and started over there and met Walt Lindsay. We were entering in the book the cars, the numbers, the engine numbers, the conductor—such as that. That was not the result of my inspection of train 75, not all of it, there were some others to be inspected. I had to finish it before I would put it all down in the book."

He testified (Page 46, Record):

"After O'Berry was released the car was allowed to settle back on the trucks—had to, because there was no other place to put the trucks."

He also testified (Page 46, Record):

"As quick as they got O'Berry out they backed the engine out and then let the car down. That was all that we could do, because we could not get the truck back. We had to get O'Berry out before the wreckage could be removed at all."

Walt Lindsay, Yard Conductor, who was making up train 75, testified (Page 53, Record):

"At the time the balance of the train was made up—when I pulled out on the transfer when I came back, they were making the movement down at the North Inman block office—got the stuff (meaning the balance of 12 or 14 cars) out of the South end of the transfer and taken it out North Inman. Another switch engine was making the movement down on that track there after I come from the hospital I couldn't say whether anything was left there after those cars had been pulled by the engine out of track 26, because I didn't work it and I don't know what time the track was cleared."

I. H. McElroy, Yard Conductor, testified (Page 53-4. Record):

"When I got there Mr. O'Berry had been released; they had taken him away. Mr. Lindsay was not there then. He had taken Mr. O'Berry to the hospital. I finished making up train 75 that night. I handled it myself. As to the movement I made—I just went back up the other part of the yard and got my engine and took the cars out and worked on the transfer of South Inman down on the yard main line and let train 75 pick them up off of the main line. I started my work South of where the collision occurred. Brought the cars to the South end, shoved them down on the yard main line of South Inman and 75 picked them up right off of the yard main line. I completed train 75 about 12 o'clock, if I remember right."

He also testified (Page 54, Record):

"If this wreck hadn't occurred the most convenient way of moving the last cut of cars, the cars that would go into 75, would have been right out on the track where the wreck happened. The happen-

ing of the wreck made it necessary to detour the cars around over another track, bringing them out another way. That is the way the train was made up. The leaving time of 75 was 11:35. It left somewhere about 12 o'clock, I don't recall exactly. My recollection is that it left about a half hour late. That was due to this trouble in the yard."

Conductor H. E. Cochran testified (Page 56, Record):

"My train was due to leave Atlanta for Birmingham at 11:30 at night. I was in the yard at the time O'Berry was hurt. I was checking up train 75. All of train 75 had not been made up at that time. Only a portion of it had been made up. After that collision my train was standing on track 9 or 10, I can't say which track. There were about 18 tracks West of 27 out there in that direction. The balance of the cars which I took to Birmingham were put into my train that night by the Yard Master, who pulled them from the South end, brought them around down on the main line and I caught them in the North Inman. I coupled to them there, as I departed for Birmingham. I went to the scene of the collision. I saw Mr. Puckett that night. I was there when the car was gotten up off of Mr. O'Berry. He was placed in a box car, as well as I remember, and I gave him a cushion out of my caboose."

C. G. Lee, who was switchman in Walt Lindsay's crew, testified (Page 67, Record):

"I don't know positively whether my engine was standing still or not, but he was going to come up behind this engine so as to get down there and get some cars of merchandise that were to go into 75, to go to Anniston."

The handling of and moving of said derailed car to clear the tracks was finally abandoned and the cars which were to go into train 75 were pulled out at the opposite end of the track and detoured after delaying train No. 75 about an hour. Plaintiff contends that while he was at work in and about said derailed car he was still engaged in interstate commerce. He had not completed the inspection of said freight train No. 75, and was assisting the other employees in the work of moving and placing the remainder of the cars to be put in train No. 75 at the time he was injured, and as soon as the rest of the cars were placed in train 75 he was to finish making his inspection, but he was still in and about the business of preparing train No. 75 to leave for its destination, Birmingham.

> "Acts of an employee in preparing an engine for a trip to move freight in interstate commerce, although done prior to the actual coupling up of the interstate cars, are acts done while engaged in interstate commerce. Although absent temporarily from his train for a short time for a purpose not inconsistent with his duty to his employer a railroad employee may still be on duty engaged in interstate commerce under the meaning of the Employer's Liability Act of 1908."
>
> **N. C. Railroad Co. v. Zachary,** 232 U. S. 249.

In the body of this decision, page 26, the following appears:

> "It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employer in interstate commerce was still 'in futuro.' It seems to us, however, that his acts in inspecting.

oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce and the circumstances that the interstate freight cars had not as yet been coupled to his engine is legally insignificant. See **Pedersen v. Del. Lack. & Western Railroad Co.**, 229 U. S. 146-151. **St. Louis & San Francisco Railroad Co. vs. Seale,** 229 U. S. 156-161. Again it is said that because deceased had left his engine and was going to his boarding house he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence clearly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that his brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See **Missouri, Kansas & Texas Railway Co. v. U. S.**, 231 U. S. 112-119."

Though plaintiff's work of inspecting the cars had been temporarily interrupted he was still engaged in and about the moving of train No. 75 which unquestionably was engaged in interstate commerce.

> "A railroad employee carrying bolts to be used in repairing an interstate road and who was injured by an interstate train is entitled to sue under the Employer's Liability Act of 1908."
>
> **Pedersen v. Del. Lack. & W. Railroad Co.**, 229 U. S. 146.

"An employee whose duty it is to take the numbers of and seal up and label cars, some of which are engaged in interstate commerce and some in intrastate commerce, is directly and not indirectly engaged in interstate commerce. Interstate transportation is not ended by the arrival of a train at the terminal. The breaking up of a train and moving the cars to the appropriate tracks for making up new trains for further destination or for unloading, is as much a part of interstate transportation as the movement across the state line."

St. Louis & San Francisco Railroad Co. v. Seale, 229 U. S. 156.

The work of plaintiff in and about the interstate transaction was continuous and was not even temporarily broken in that all plaintiff was doing tended to and was bringing about the movement of train No. 75 in interstate commerce, for he was still in and about the completion of said train in getting it ready for its trip to Birmingham.

We cannot believe that a mere temporary interruption of the particular task of an employee to which he is presently to return and an intermediate assignment to another task, the performance of which tends to promote and further the interstate transaction of the carrier, can have the effect to withdraw him in such interim from the protection of the Federal Statute. Such a construction of the statute, it seems to us, would defeat the very ends and purposes for which this great remedial law was manifestly designed. To illustrate:

Under such a construction, if a tree should suddenly fall in front of an interstate train and the engineer should leave his engine and assist in removing the obstruction in order that his train might proceed upon its journey, he could not, if injured by the negligence of a

co-employee, recover, for he would not be engaged in interstate traffic and must lose the benefit of the statute enacted for his protection.

Or, if his engine should run over and crush a pedestrian upon the crossing of a public highway, the engineer could not, in response to the ordinary promptings of a humane impulse, leave his engine and assist in removing the injured person from under its wheels without surrendering his right to the protection of the statute in question, even though without such removal his train could not proceed.

Or, if while running an engine over an interstate railroad and carrying a train loaded with interstate commerce the engineer should encounter an obstruction upon the track consisting of a freight car loaded with intrastate traffic lying across the track, he could not, even though so instructed by his superior officer, leave his engine and assist in the removal of such obstruction without surrendering his right to the protection of the statute, though the removal of such obstruction was necessary to the passage of the interstate train which he was handling.

We submit, that counsel for the plaintiff in error misinterpret the scope of the ruling of this Court in the Behrens case, and we further submit that this case is controlled by the principle of the case of the **North Carolina Railroad Co. v. Zachary,** 232 U. S. 248; the case of **Pedersen v. L. & W. Railroad Co.,** 229 U. S. 146; **New York Central R. R. v. Carr,** 238 U. S., 260-1 et seq., and the very recent case of **L. & N. Railroad Co. v. Parker, Admnr. of Parker,** appearing in the advanced sheets of Vol. 242, U. S., P. 13, the opinion having been delivered Nov. 13, 1916. These cases are of such recent date and are so familiar to the Court that it is unnecessary to make an extended reference to them.

THE NEGLIGENCE OF THE DEFENDANT COMPANY WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

It was contended in the court below and insisted here that because the plaintiff stumbled upon some clinkers and before he had fully recovered caught his foot under a cross-tie and was thrown to the ground and injured that the presence of the clinkers at the place where he fell was the proximate cause of his injury, and that inasmuch as the Supreme Court of Georgia in a certain case had held that an injury caused by falling over a clinker in the yard of the railroad company was an accident the plaintiff could not recover in this case, the reasoning being that inasmuch as negligence under that decision of the Supreme Court of Georgia was not predicable of the clinkers being on the railroad yard the casualty must be attributed to the accident.

It will be noted in the case now under review that the Court of Appeals declines to extend the principle of the case in question, that is **Lee v. The Central Railroad & Banking Co.,** 86 Ga. 231, and we submit, properly declines to extend it.

Notwithstanding certain dicta appearing in the case just cited, and certain other Georgia cases, there is no such magic in the word "clinker" as without reference to its size or the circumstance of its location will render it so entirely innocuous as to enable a court judicially to declare that negligence cannot be predicated of its being left in a pathway along which employees are required and accustomed to pass. We submit that whether negligent or not will depend, first, upon whether the negligence claimed is charged against one who is under a duty to keep the pathway safe; second, whether the clinker is of such size as to render its presence in the

pathway a source of probable danger to one using the pathway with ordinary care and prudence. The same reasoning which would sustain a ruling that negligence could not be predicated upon the presence of the clinker would apply to the presence of a stone, or block of wood, or any other object which might be a source of danger to one passing along, so the mere fact of the obstruction being a "clinker" is of no consequence.

Whether or not the plaintiff assumed the risk of stumbling over clinkers or whether he was in the exercise of ordinary care in failing to take notice of them is another question and depends, first, upon whether the clinkers were in the place where under all of the circumstances of the case he had reason to suspect their presence; second, upon whether he knew, or in the exercise of ordinary care, ought to have known of their presence. In view of the rules of the company which are printed on pages 68 and 69 of the record, we submit, not only was the plaintiff not bound to anticipate that there would be clinkers at the place where he was injured, but the rules were themselves an assurance to him that the pathway which he was travelling was free from obstructions which might endanger his safety. He had a right to presume that the other employees of the defendant company had collected and removed all the rubbish and waste material accumulated on the right-of-way and grounds of the defendant company. The clinkers under the evidence, were used in ballasting the track. There was a special place set apart by the company for the clearing of engines and storage of clinkers, and he had a right to presume that the yard where he was at work was clear of such obstructions, and particularly upon the path along which he was required to go. The master was under a non-delegable duty to furnish him a safe place to work and this necessarily involved the keeping of the pathway along which the employees are required to pass free from obstruction, and we submit that the failure to

keep the pathway clear of obstruction was such negligence as would prevent the casualty from falling within the classification of an accident, assuming even that the stumbling on the clinker was the proximate cause of the injury. If the company was negligent in any particular then the injury could not have been the result of accident. No casualty can be ascribed to accident where negligence concurs with chance in bringing about an injurious result.

Puckett could not be held to have assumed the risk of the negligent failure of the company to keep the pathway clear of obstruction unless with knowledge of such failure he nevertheless undertook the venture. It is not pretended that Puckett knew either of the presence of the clinkers or that the cross-ties over which he fell were in the way. He was passing along at night with no reason to suspect that there was any obstruction in the path, whether clinkers or cross-ties, his mind intent upon the business of the company, so we submit that under no circumstances could even negligence be attributed to him.

THE EFFICIENT CAUSE OF THE INJURY WAS THE NEGLIGENT LEAVING CROSS-TIES ACROSS THE PATH.

The last clause of Rule 814 is as follows (See Pages 68 and 69, Record):

> "that fences are kept in repair and that all brush, weeds, worn out ties, timber and other rubbish are collected and promptly burned."

Rule 816 of the Company provides as to the track supervisor:

"They must not allow lumber, timber, ties, rails, or other freight or material to be piled within ten feet of the main track nor within seven feet of any side track."

Rule 852, which relates to the duties of track foremen, provides:

"They must not allow lumber, timber, ties, rails, or other freight or material to be piled up or placed upon the ground within ten feet of the main track or seven feet of any side track, and must see that all such freight or material left near the tracks is so placed that it cannot fall upon or near them."

Rule 894 is as follows:

"They must collect ties, timber, rails, frogs and other material and fixtures taken from the track or structures or falling from passenger trains, once a week. As soon as they have been inspected by the Track Supervisor, they must be assorted in accordance with such inspection, all condemned ties, timber and lumber must, unless otherwise directed, be burned. Second-hand material and scrap must be properly stored. Grass, weeds, and other rubbish cut or accumulated upon the right-of-way and grounds must also be promptly collected and burned."

See Rule 796, which is as follows:

"They must see that their yards are kept in good order; that links, pins, scrap and other material scattered upon the ground are promptly collected and stored, and nothing is allowed to remain upon and between the tracks that involves risks to property or persons."

The cross-ties in question were left across the pathway within two and a half feet of the track itself. Explaining their condition and their relation to the track, Puckett testified (see page 38 of the printed record):

> "As I was going down the track, I got down in about a car length and a half of the engine, I struck some clinkers, the first thing that started me—I struck those and kind of stumbled and I struck some old cross-ties and that shot my foot under one and I couldn't pull it out from under it, and it jerked me and threw me right face foremost and my right foot went that way, and my left foot was back this way, and it made me spring up in my back and the blocks fell right on top of me—across my back. I stumbled around there—I don't know how—I twisted around there and got one of the blocks by me, and I pulled up by the side of this on a car and I come to feeling around there and got my lamp and lit it and set it on the cross-ties. I looked and examined the cross-ties after I lighted my lamp, I looked around there. I picked up that smallest block and it had a spike in the end of it that stuck out about four inches, and I pulled this block up and I took hold of the spike and I followed it around, going on down there, and I got there and I made them put the jack under the end to get the boy out. I shined my light around and I seen that the cross-ties were old, worn out cross-ties. Weeds and grass had growed up over them, and just hid them. From those cross-ties to the rail that were in the track itself was not over two and a half feet. I walked along there three or three and a half feet from the rail. I did not know those cross-ties were there. Before this injury it had been sometime since I had had occasion to walk along there. I suppose it had been four or five months, maybe six months.

The time that I passed by there, the last time before this injury, the pass-way by the side of the track was perfectly clean. No ties over there at that time."

He also testified (See page 44, Record):

"I stumped my toe against some clinkers. Some two or three, I suppose, were large ones. That started me to stumbling and in shooting this foot under the tie, jamming it up under there; it twisted and threw me right face foremost. What I stumbled on was the clinkers, that was what first started me. I never would have fell if I hadn't struck the cross-ties. I first stumbled against the clinkers, in four or five feet of where I struck the cross-ties which threw me face foremost. I was running as hard as I could run. I hit the clinkers and that made me stumble some. I was running as fast as I could and hit the clinkers and that made me stumble and three or four feet from the clinkers were the cross-ties. When I struck the cross-ties that threw me face foremost. When I am running as fast I can, with a load like that, I could not go far in a leap. Something like three feet is about as far as I could step. I stumbled over the clinkers and jumped three feet, then my foot hit the cross ties and then I stumbled and fell right face foremost. I hit the cross ties. The end of it must have been something like three and a half feet from the rail. I do not say whether the space between the end of the crossties and the rail was perfectly clean. The rail comes over here and the crossties project out a piece. Weeds and grass was all I seen until I hit this tie."

He further testified, (page 38, Record):

"I shined my light around and I seen the cross-

ties were old, worn out crossties. Weeds and grass had growed up over them, and just hid them. From those crossties to the rail that were in the track itself was not over two and a half feet. I walked along there three or three and a half feet from the rail. I did not know those crossties were there."

C. G. Lee, a switchman, testified, (See page 66, Record):

"I remember the night that Mr. Puckett was hurt. At the time of the derailment of that engine and cars on track 26, I was sitting down over there just opposite a telegraph pole waiting to get merchandise on the north end, 75's merchandise (meaning the remainder of the cars to go in 75). I was standing right as close as from here to that post (indicating a post in the Court room)I supposed when it happened."

Lee further testified (Page 66, Record):

"I did not see any crossties that night until I stumbled over them with my foot. I was walking along with the jack and had this hand, this way next here on the other side—I was walking in front of the other man over there opposite track 27 and I struck something with my foot, stumbled a little and I looked down to see what it was and it was crossties. I come on with the jack and just as I got on the other side of the ties Mr. Puckett struck them and fell."

Lee further testified (See page 67, Record):

"I was in front. The negro was back between me and Mr. Puckett. I was walking along the narrow space and of course was headed north, and the negro was headed north, both were in front of Puck-

ett. I was walking pretty fast. I was walking as fast as I could with this big heavy jack. I was not running. Mr. Puckett was not running. I am certain Puckett was not running. I dont' know whether Mr. Puckett knew that I saw him fall down. I stopped, looked back and went on."

On page 68 of the Record, he also testified:

"As I was going toward the collision I saw back of me that Puckett had fallen down and I didn't go back to him at all. I looked back, I seen him fall. I heard him as he fell. I didn't go back to him then. I just kept right on."

It will be noted that these crossties were overgrown with weeds and grass which hid them. The witness McElroy who testified for the plaintiff (See Page 54 of the Record) upon the subject as to the length of time it would take for grass to grow over crossties, upon cross examination stated:

"As to how long it would take grass to grow over a few crossties and cover them up it is according to the weather. In rainy weather, raining all the time it would take but a few days, I would say five or six days. The size of ordinary crossties is about six inches thick, about eight inches across the face, across the top. It would take a month for grass growing up enough to cover cross ties or it might be more depending on how rich the land was and the state of the season."

Whether it can be declared negligence as matter of law to permit crossties to lie within two and a half feet of the track of the railroad company for at least a month, the circumstance that they were so permitted to lie for that length of time in violation of an express rule

of the company which enjoined upon those in authority to see that they were removed to a distance greater than seven feet from any side track, was certainly sufficient to justify an inference upon the part of the jury that the defendant was guilty of negligence.

Puckett's testimony is undisputed that while he stumbled first upon the clinkers he would not have fallen except for the crossties. Human experience teaches that we may many times stumble as we walk along the street but rarely fall. It also teaches that catching the foot under a stationary object of sufficient weight to arrest one's progress while walking will almost invariably result in a fall, and particularly if the obstruction be encountered unexpectedly. The stumbling over the clinker in this case was not even a contributing cause of the fall. It merely interrupted for an instant the regular progress of the plaintiff in his walk. There was nothing in the stumbling on the clinkers to cause him to fall. The stumbling on the cinlkers did not cause him to catch his foot under the crossties. He was only describing in detail circumstances, immediately preceding the principal fact which brought about his fall. That he would have recovered his equilibrium if he had not encountered the crosstie is under the evidence hardly open to question, but it is clear that when he struck the crosstie he encountered the real cause, the "causa sine qua non" of which the books speak.

It would be unprofitable to enter into an extended discussion of remote and proximate causes, a subject with which the Court is thoroughly familiar.

The officers of the railroad company charged with the duty of removing the ties from the place in which they were, were guilty of negligence in failing to perform that duty. While it is true that they all swear in more or less categorical way that they had from time to time examined the road-way to see that it was clear from obstructions the physical facts of the case demon

strate that there was no adequate attention to this duty upon the part of these employees, for if there had been such an examination of them as would have made the pathway reasonable secure, it is utterly inconceivable that these cross ties should have been permitted to lie directly in the path for at least a month, or long enough for the grass and weeds to have grown up over and hidden them, without having been discovered if any inspection, however casual, had been made of the place.

Authorities:

"If the 'skids' or planks were placed on or near the track of the defendant's road when the injury occurred and they occasioned the injury to plaintiff while in obedience to orders, and without fault or negligence on his part, the company would be liable."

Central Railroad Co. v. Debray, 71 Ga. 406.

"The plaintiff, an employee of a railroad company, having been injured by a locomotive of the defendant in the State of Alabama, and the employer being, under the law of that state, liable to answer in damages for personal injuries received by an employee in the service of business of an employer, when such injuries are 'caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in, the business of the . . . employer', and there being evidence introduced by the plaintiff that the jury could reasonably infer that the track of the defendant at the place where the plaintiff was injured was full of coal and coke, in most places as high as the rails and in some places higher, and was 'dangerous for men to switch around at night', that the track had been in this condition for some-

time, and that the injuries complained of were attributable to these obstructions on the track, a verdict in the plaintiff's favor was not unwarranted."

R. & D. Railroad Co. vs. Mitchell, 95 Ga. P. 79.

It will be noted that the Employer's Liability Act of 1908 provides for the recovery

> "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

The striking similarity of the Alabama Statute dealt with in the 95 Ga., just above mentioned, and the Federal Employer's Liability Act of 1908 will be noted.

We submit, therefore, that upon the whole case, upon consideration of all the evidence in the case, not only was the plaintiff engaged at the time of his injury in Interstate Commerce, but he was injured as a consequence of an insufficiency due to its negligence of the works, ways, etc., of the defendant company. The judgment of the Court of Appeals of Georgia, we submit, therefore, should be affirmed.

Respectfully submitted,

Edgar Watkins,
Spencer R. Atkinson

.....,
Attorneys for Defendant in Error.

Atkinson & Boone
of Counsel.

SOUTHERN RAILWAY COMPANY *v.* PUCKETT.

ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 219. Argued April 25, 1917.—Decided June 11, 1917.

A case arising under the Federal Employers' Liability Act, as amended April 5, 1910, c. 143, 36 Stat. 291, cannot be removed to the District Court upon the ground of diversity of citizenship.

Plaintiff's injury occurred while he was helping in the task of raising a wrecked car to rescue a fellow employee and, coincidently, to clear a track for interstate commerce. *Held:* Engaged in interstate commerce, within the Federal Employers' Liability Act.

The mere fact that the employee was engaged in interstate commerce when called aside by the event which led to his injury does not stamp his employment at the time of injury as an employment in interstate commerce.

Finding no reason for disturbing the finding of both state courts as to the defendant carrier's negligence, and no exceptional circumstances being involved, this court merely announces its conclusion.

16 Ga. App. 551, affirmed.

THE case is stated in the opinion.

Mr. Sanders McDaniel, with whom *Mr. L. E. Jeffries* and *Mr. E. R. Black* were on the briefs, for plaintiff in error.

Mr. Edgar Watkins, with whom *Mr. Spencer R. Atkinson* and *Mr. E. W. Born* were on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Puckett recovered a verdict and judgment in the City Court of Atlanta against the Southern Railway Company

for damages arising from personal injuries sustained by him in August, 1911, while at work for the company in its yard at Atlanta, Georgia. As submitted to the jury, the action was founded upon the Federal Employers' Liability Act of April 22, 1908, as amended by Act of April 5, 1910, (35 Stat. 65, c. 149; 36 Stat. 291, c. 143). The judgment was affirmed by the Georgia Court of Appeals (16 Ga. App. 551), and a writ of error brings it under our review.

The record shows that a petition and bond for the removal of the cause to the appropriate federal court upon the ground of diversity of citizenship was filed in due time by the defendant and overruled by the trial court. An assignment of error based upon this ruling has been abandoned, and properly so, in view of our decision in *Kansas City Southern Ry. Co.* v. *Leslie*, 238 U. S. 599, 602.

Whether, at the time he was injured, plaintiff was employed in interstate commerce, is the only substantial question; there being no dispute that defendant at that time was a common carrier by railroad engaged in commerce of that character.

As detailed in the opinion of the Court of Appeals, the circumstances of the occurrence were as follows: Plaintiff had been engaged in inspecting cars which had been put into an interstate train—No. 75—that ran between Atlanta, Georgia, and Birmingham, Alabama; he had inspected about 25 cars, and there remained to be inspected about 12 cars which were to be placed in the same train; while plaintiff was waiting for these, a collision between other cars of defendant occurred in the yard nearby, and several tracks were blocked by the wreckage; one of defendant's employees named O'Berry was caught in the collision and pinned beneath a car; in obedience to the printed rules of the company, plaintiff went immediately to the scene of the wreck to render what assistance he could, and was there instructed by a superior employee to go and get a "jack" to assist in raising the wrecked car

so as to extricate O'Berry and clear the tracks of the wreckage; some of the remaining cars not yet placed in train No. 75 were to have been hauled over the tracks that were obstructed by the wreck, and on account of the obstruction it became necessary to detour them, whereby train No. 75 was delayed for about an hour; while plaintiff, assisting in clearing up the wreck, was carrying some blocks on his shoulder to be used in jacking up the wrecked car and replacing it upon the track, he stumbled over certain large clinkers which were on the roadway near the track, and, in stumbling, struck his foot against some old cross ties overgrown with grass, and in consequence fell and was seriously injured.

The court held that although plaintiff's primary object may have been to rescue his fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facilitated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured.

We concur in this view. From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce. The case is controlled by *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152; *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260, 263; *Pennsylvania Co.* v. *Donat*, 239 U. S. 50; *Louisville & Nashville R. R. Co.* v. *Parker*, 242 U. S. 13. *Pedersen* v. *Delaware, Lackawanna & Western R. R. Co., supra*, holds that a workman employed in maintaining interstate tracks in proper condition while they are in use is employed in interstate commerce; the other cases are to the effect that preparatory movements in aid of interstate transportation are a part of such commerce within the meaning of the act.

Of course, we attribute no significance to the fact that plaintiff had been engaged in inspecting interstate cars before he was called aside by the occurrence of the collision. *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473, 478; *Erie R. R. Co.* v. *Welsh*, 242 U. S. 303, 306.

It is contended that there was no sufficient ground for attributing negligence to defendant because of the presence of large clinkers in the path along which plaintiff, in the course of his duty, was called upon to pass. This is no more than a question of fact, without exceptional features, and we content ourselves with announcing the conclusion that we see no reason for disturbing the result reached by two state courts. *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466.

Judgment affirmed.

THE CHIEF JUSTICE dissents.